Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

Mark Dusbabek, et al.,

Petitioners,

v.

Reggie White, National Football League, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 19, 1995

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QUESTIONS PRESENTED

1. Whether the constitution provides a right to opt out of a class action involving claims for monetary relief. Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), cert. granted in part, 114 S.Ct. 56 (1993), cert. dismissed as improvidently granted, 114 S.Ct. 1359 (1994); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), cert. denied, 487 U.S. 1223 (1988).

2. Whether the federal District Court erred in certifying a mandatory, non-opt out class under Rule 23.

3. Whether the District Court erred in failing to ensure that the settlement was fair, reasonable and adequate.

LIST OF PARTIES

All Parties to this Petition are not listed in the caption.

Petitioners are Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe and Gregory Scales. These National Football League ("NFL") player Petitioners were known collectively as the "Vikings Appellants" in the proceedings before the United States Court of Appeals for the Eighth Circuit, and as the "Vikings Objectors" or "Vikings Plaintiffs" in the proceedings before the United States District Court, District of Minnesota. These Petitioners are represented by the Schatz Paquin law firm.[1]

Petitioners also include NFL player Petitioners Maurice Hurst and John Fourcade who were represented by the Wiedemann & Wiedemann law firm in the proceedings below, and Byron Evans represented by the Haralson, Kinerk & Morey firm.

Additional Petitioners will appear separately.[2]

Respondents are NFL players Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson. These Respondents were plaintiffs in the proceedings before the United States District Court, District of Minnesota, and appellees before the United States Court of Appeals for the Eighth Circuit.

Respondents also include National Football League; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

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[1] The name of the Schatz Paquin firm has changed during the course of the proceedings below, but there has been no change in counsel of record for these Petitioners other than Vance Opperman no longer being one of the counsel for these Petitioners.

[2] Petitioners represented by the law firm Howarth & Smith will file an appendix of the voluminous orders and decisions below to which Petitioners herein join.

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area Pro-Football, Inc. These Respondents were defendants in the proceedings before the District Court, and appellees before the Court of Appeals.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Mark Dusbabek, Carl Lee,
Audray McMillian, Felix Wright,
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Sammy Martin, Don Beebe
Gregory Scales, Byron Evans,
Maurice Hurst, and John Fourcade,

Petitioners,

v.

Reggie White, National Football League, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully ask that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit and United States District Court for the District of Minnesota in this case.

OPINIONS BELOW

Petitioners appeal from the following decisions of the United States District Court, District of Minnesota:

(1) April 30, 1993 Order[3] denying, inter alia, all motions to object to the class action settlement agreement in this case, including the monetary and injunctive provisions therein, and granting the motion of the NFL to enjoin certain cases, including the individual Complaints filed by Petitioners herein;

(2) August 19, 1993 Order[4] granting, inter alia, final approval to the amended stipulation and settlement agreement (the "Settlement Agreement"); and

(3) August 20, 1993 Final Consent Judgment.[5]

Petitioners also appeal from the following decisions of the United States Court of Appeals for the Eighth Circuit:

(4) December 6, 1994 panel affirmance of the decisions of the District Court;[6] and

(5) January 20, 1994 denial of Petitioners' request for rehearing and request for rehearing en banc.[7]

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[3] This order is reported at 822 F. Supp. 1389 (D.Minn. 1993) and is reproduced in the Appendix at 170-300.

[4] This order is reported at 836 F. Supp. 1458 (D.Minn. 1993) and is reproduced in the Appendix at 34-169.

[5] This judgment is reported at 836 F. Supp. 1508 (D.Minn. 1993) and is reproduced in the Appendix at 26-33.

[6] This order is reported at 41 F.3d 402 (8th Cir. 1994) and is reproduced in the Appendix at 2-17.

[7] This order is unpublished and is reproduced in the Appendix at 1.

JURISDICTION

The Eighth Circuit judgment was entered December 6, 1994. Petitions for rehearing and rehearing en banc were denied January 20, 1995. This Court has appellate jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Amendment V to the United States Constitution provides, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law."

The certification and settlement of the class action below was carried out pursuant to Fed.R.Civ.P. 23, fully set forth in the Supplemental Appendix.

STATEMENT OF THE CASE

Introduction

The District Court[8] certified a class and approved a settlement in an antitrust class action brought by certain NFL players against each of the 28 NFL member teams for anticompetitive conduct, including anticompetitive restraints on the rights of players to move from one team to another, the likes of which have plagued the NFL for years.[9] While league-wide damages in this case exceed half a billion dollars, the District Court, in addition to other errors of law, approved a settlement agreement for approximately 20% of the actual antitrust damages

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[8] Hon. David S. Doty, United States District Court Judge, District of Minnesota.

[9] See generally, White, 822 F. Supp. at n.2 (discussing history of NFL antitrust violations).

to the NFL players and certified the settlement class as a mandatory, non-opt out class under Rule 23 -- holding, without evidentiary support and in the face of a $200 million dollar settlement fund, that the case did not involve sufficient claims for monetary relief to afford absent class members their constitutional right to opt out of the class. Instead, the District Court found the settlement was fair, adequate and reasonable. Petitioners appealed. 41 F.3d at 406 (App. 9).

A three-member panel of the United States Court of Appeals for the Eighth Circuit[10] affirmed. Id. at 405 (App. 9).

Petitioners (all absent class members in the White v. NFL litigation and settlement) had moved to intervene in the White action. 822 F.Supp. at 1399, 1432-33, n. 17 (App. 187, 285-88, 298-99). Those motions were denied, other than to allow Petitioners to intervene in order to formally object to the proposed settlement and class certification and to preserve their rights to appeal. Id. Petitioners argued before the District and Appellate Courts that the United States Supreme Court's holding in Shutts[11] and the holding of the Ninth Circuit Court of Appeals in Ticor[12] that an absent class member is constitutionally entitled to opt out of a class involving claims of monetary relief, entitled Petitioners here to opt out of the White settlement class. The Court of Appeals reasoned that by moving to intervene, however, Petitioners were no longer "absent" class members. 41 F.3d at 406-07 (App. 12-14). That finding of the Court of Appeals not only conflicts with decisions of this and other courts, but it creates new precedent which renders this Court's decision in Shutts virtually meaningless.

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[10] Hon. Theodore McMillian, Hon. David R. Hansen, and Hon. Morris S. Arnold, Circuit Judges.

[11] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[12] Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. granted in part, 114 S.Ct. 56 (1993), cert. dismissed as improvidently granted, 114 S.Ct. 1359 (1994).

Under the panel's construction of these jurisdictional principles (and misapprehension of those principles as affecting Rule 23 constitutional considerations), there could be no conceivable circumstance where any absent class member would be entitled to opt out of a damages class. That result does not conform with the principles articulated in Shutts, nor does it bode well for future class actions involving these frequently arising issues – issues which this Court attempted to resolve in Ticor.

The two fundamental injustices which occurred in this case before the District Court – (1) failure to certify the class under Rule 23(b)(3); and (2) approval of the unfair, unreasonable and inadequate injunctive and monetary provisions of the Settlement Agreement – were as inequitable as the stream of misguided attempts to resolve the antitrust concerns which have plagued the NFL in various forms of anticompetitive NFL "rules" for years.

NFL antitrust history

Despite the availability to players of collective bargaining, professional sports players historically have been largely unsuccessful in eradicating oppressive restrictions on their mobility and earning power in a truly free market place.[13]

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[13] See, e.g., Brown v. NFL, 1995 WL 115729, *15 (D.C.Cir.) ("[E]mployer restraints on the labor market are most prominent in professional sports. Employers in other fields generally favor open competition in the labor market, believing that, in the absence of chronic labor shortages, competition for jobs will generally hold down wages and produce higher quality and better motivated workers. ... In professional sports, however, the situation is reverse. Because top athletic talent is scarce, competition tends to drive salaries up, at least for the top performers. Thus professional athletes have sought to maximize competition among employers for their unique athletic skills. Predictably, the owners have reacted with multiemployer efforts to restrain competition for professional athletes' services. [Citing football, basketball, baseball, and hockey litigations.] Nonetheless, it is important to remember that multiemployer labor market restraints are not entirely confined to professional sports, so that today's

Significant in the NFL history are the number of ill-conceived and poorly executed attempts by the NFL to keep as much control as possible over the players, the real parties in interest here. Equally disparaging are the variety of "new systems" which have been created to do essentially the same thing--pay players far less than the true market value of their services while retaining the utmost control over player mobility.

Mackey, supra, was filed on behalf of NFL players to challenge the "Rozelle Rule." That rule gave then NFL Commissioner Pete Rozelle significant control and power to set compensation for teams that lost players to other teams. The players won Mackey, and as a result the NFL and the players' association ("NFLPA") entered into collective bargaining agreements which provided for a "Right of First Refusal" and a related team "Compensation system" to remain in force. In 1987, when the 1982 collective bargaining agreement expired, the NFLPA tried to enter a new collective bargaining agreement with the NFL. The NFL wanted to continue the restrictive system, however, so the players went on strike. That strike, however, failed to lead to a new collective bargaining agreement.[14] Thus, certain players filed a class action complaint in October 1987 in

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majority rule has implications beyond the football gridiron."; (citations omitted)). See also Mackey v. NFL, 407 F. Supp. 1000, 1010 (D. Minn. 1975) ("from its inception through the present day, [the players' union] has been too weak vis-a-vis the clubs to obtain elimination of or even a reasonable modification of the Rozelle Rule").

[14] See Berry & Gould, A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes, 31 Case W. Res. L. Rev. 685, 747 (1981) (the threat of anticompetitive liability was the most powerful force in promoting collective bargaining between owners and players). See also Garvey, Forward to the Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL, 1989 Duke L.J. 328, 330 ("Given the ease with which the NFL crushed the union's 1987 strike, an obvious mismatch at the bargaining table exists.") Mr. Garvey is the former Executive Director of the NFLPA.

the District of Minnesota against the NFL and its 28 member teams, alleging that the continued imposition of this system -- without union consent -- constituted an unreasonable restraint of trade in violation of the antitrust laws. Powell v. NFL, 678 F.Supp. 777 (D. Minn. 1988). Defendants moved for summary judgment, arguing that the challenged restraints remained protected by the "nonstatutory labor exemption" to the antitrust laws, even though there no longer remained any relevant labor agreement. On January 29, 1988, the District Court denied summary judgment, and ruled that where a challenged restraint on competition was incorporated in a bona fide collective bargaining agreement, the nonstatutory labor exemption from the antitrust laws survived only until such time as the parties reached a bargaining impasse. Id. at 789.

On July 11, 1988, the District Court in Powell ruled that, as the NFLPA and the NFL had in fact reached an impasse regarding the restrictive system, these restraints were subject to the antitrust laws, and were likely to be found at trial to be an antitrust violation. Powell, 690 F.Supp. 812, 814, 818 (D. Minn. 1988). In response to that ruling, the NFL unilaterally and without player approval implemented "Plan B" on February 1, 1989.[15]

On November 1, 1989, the Eighth Circuit reversed the summary judgment ruling and held the nonstatutory labor exemption continued to protect the NFL's player restraints until the players abandoned their collective bargaining rights. Powell, 930 F.2d 1293, 1303-04 (8th Cir. 1989), cert. denied, 498 U.S. 1041, 111 S.Ct. 711 (1991). The players did so. Powell, 764 F.Supp. 1351, 1356 (D. Minn. 1991).

Eight football players (the "McNeil plaintiffs") then sued the NFL in the District of Minnesota, alleging that the unilateral imposition of Plan B restraints constituted an illegal trade

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[15] See McNeil v. NFL, 790 F.Supp. 871, 876 n. 4 (D. Minn. 1992) (discussing components of Plan B).

restraint. The District Court refused to dismiss the plaintiffs' challenge to Plan B, holding that "the proposed wage scale would likely violate Section 1 of the Sherman Act." McNeil, 790 F.Supp. 871 (D. Minn. 1992). McNeil then came to trial, and the jury returned a verdict finding that Plan B and the First Refusal/Compensation rules violated Section 1 of the Sherman Act, and awarded damages. McNeil, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).

The White litigation

On September 21, 1992, this case, a proposed class action seeking injunctive relief against the NFL, was filed in the District of Minnesota. 822 F. Supp. at 1394 (App. 171). A First Amended Complaint was later filed, adding a class action monetary damages claim under Rule 23(b)(3). Id. at 1395 (App. 173). The District Court then certified a 23(b)(1) damages and injunctive settlement class. 822 F. Supp. at 1395 (App. 174-75).

The Plan B restraints found illegal by the McNeil jury were in full force and effect during the career primes of each Petitioner here who has suffered monetary injury directly resulting from the NFL's restrictive practices. Therefore, certain Petitioners filed similar federal lawsuits in Minnesota.[16] 822 F.Supp. at 1433, nn. 73, 74 (App. 288-89).

The District Court enjoined Petitioners from pursuing their complaints, 822 F. Supp. at 1433-35, 1436-37 (App. 288-94, 299-300), approved the White settlement, and entered judgment.

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[16] See White, 822 F. Supp. at 1436-37, enjoining seventeen lawsuits, including those involving certain Petitioners here (App. 299). Each Petitioner here, among numerous others, also formally objected to the preliminary and final approval of the Settlement Agreement, challenging both the reasonableness, adequacy and fairness of the agreement and the propriety of the District Court's certification of a Rule 23 mandatory, non-opt out class. 822 F.Supp. at 1397-98, 1424-25 & nn. 11, 12, 13, 50, 51, 52, 53 (App. 180-83, 262-65 and notes).

See generally 836 F. Supp. 1458 (App. 34-169), 836 F. Supp. 1508 (App. 26-33).

The final Settlement Agreement includes, among other things, structural and monetary "relief" which, Petitioners vehemently argued before the District and Appellate Courts, is nothing of the sort. The agreement attempted to replicate true, free, agency but fell far short. See 41 F.3d at 405 ("The central issue in this labor dispute was the conflict between the player's desire to complete free agency and the NFL's desire to maintain competitive balance among its teams") (App. 9-10). The settlement also fell well short of adequately compensating the class. While experts set damages figures in excess of half a billion dollars, the agreement provided that the NFL would pay White class members less than $200 million over time. While the settlement claimed to provide an average absent class member player benefit of about $100,000 under a point allocation system, 822 F.Supp. at 1419 (App. 246), the named plaintiffs secured for themselves (but not for the class they purportedly represented) their full damages. Id. at 1415 (App. 233).[17] Each of Petitioners' procedural and substantive objections to the class certification and settlement were rejected. See generally 41 F.3d 402 (App. 2-17).

REASONS FOR GRANTING THE WRIT

This Court held in Shutts that absent class members in Rule 23 class actions "wholly or predominantly" involving claims for monetary relief are constitutionally entitled to opt out of such damages classes. That mandate was followed and expanded by

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[17] Vann McElroy, for example, secured for himself (and at the sacrifice of the class he was named here to represent) his actual damages of $470,194. Another named plaintiff in a related case which was consolidated with White secured for himself his actual damages of $711,600. Id. Petitioners presented the District and Appellate Courts with data showing Petitioners' actual damages were hundreds of thousands of dollars in excess of the $70,000 available to them as class members under the point allocation system.

the Ninth Circuit in Ticor, which held that this mandate applies whenever "substantial damages claims" are asserted. This is such a case.

In dissenting from this Court's dismissal of the writ of certiorari in Ticor, Chief Justice Rehnquist and Justices O'Connor and Kennedy urged this Court to rule on the constitutional issue presented there, and stated: "The resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate. ... Either an opt-out right is constitutionally required, or it isn't. ... We granted certiorari to consider whether such a right exists. The issue has been thoroughly briefed and argued by the parties. We should decide it."[18] This Court now may do so.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION, WITH BROAD IMPLICATIONS FOR THE ADMINISTRATION OF FEDERAL CLASS ACTIONS, WHICH THIS COURT RECENTLY ATTEMPTED TO DECIDE IN TICOR.

Underlying the intent of Rule 23 is the balance of consolidating or avoiding conflicting interests: judicial economy and efficiency of mass litigation on the one hand,[19] and the liberty rights of individuals to pursue their own litigation fate on the other.[20] The latter fundamental liberty interest was recognized long ago in Hansberry v. Lee, 311 U.S. 32 (1940). There, the Supreme Court held that the res judicata or mandatory effect of a purported class suit involving a restrictive property agreement

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[18] 114 S.Ct. 1359, 1363-64.

[19] See, e.g., 3 H. Newberg, Newberg On Class Actions § 717.06 (3d ed. 1992).

[20] See, e.g., Miller & Crump, Jurisdiction And Choice Of Law In Mandatory Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986).

violated the plaintiffs' due process rights. 311 U.S. at 40-42. The due process concern highlighted by the Supreme Court decades ago in Hansberry remains a fundamental concern today.

The two most recent and important decisions regarding due process constraints on class actions are Shutts and Ticor. The Supreme Court in Shutts and later appellate authority hold that due process requires a class action involving substantial claims for money damages to provide at a minimum an opt-out provision.

Shutts, a class action, involved claims made against a gas company for money damages resulting from delayed interest payments made to leaseholders. The leaseholders resided in all 50 states, the District of Columbia, and several foreign countries. In approving class certification under a Kansas statute similar to Rule 23(b)(3), the Supreme Court held:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812. See also Ticor, 982 F.2d at 393 (citing Shutts).

Ticor involved the consolidated multijurisdictional litigation of antitrust claims brought by title insurance holders against Ticor and other title companies. Id. at 387-88. Class plaintiffs alleged price fixing and sought monetary and injunctive relief. Id. Several cases were consolidated as Multidistrict Litigation ("MDL") 633 and the class was certified as a mandatory class under Fed. R. Civ. P. 23(b)(1) and (b)(2). Id. at 388-89. Thereafter, a global settlement was reached between the parties and was approved by the MDL 633 court. Id. at 388.

Both the Attorney General of Arizona and an individual plaintiff who represented a class of plaintiffs in two other states were allowed to pursue post-settlement cases against defendants, over defendants' objections that res judicata bound these plaintiffs to the MDL 633 settlement agreement. Id. at 388-90, 392. The Ninth Circuit disagreed, and held that precluding a plaintiff from opting out of a mandatory class certified under Rule 23(b)(1) involving monetary and injunctive claims would violate due process. Id. at 392.

The Ninth Circuit also held that although res judicata would bar the absent class plaintiffs from relitigating the claims for injunctive relief resolved by the MDL 633 settlement, minimal due process required that plaintiffs should have been allowed to opt out of the mandatory class to pursue their own damages claims. The Court stated:

> According to Shutts, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by res judicata.

Id., citing Shutts (emphasis added).

Petitioners here primarily seek monetary relief from the antitrust injustices they have suffered at the hands of the NFL. Petitioners also seek relief from the most recent form of anticompetitive restrictive schemes inflicted upon them by the Settlement Agreement embodied in the Orders and Judgment of the District Court below, which improperly denied their right to decide their own litigation fate and imposed upon them a "new" system of player restraints just as restrictive and as unfair as any

of the NFL's earlier anticompetitive schemes. Since the White class was certified with no "opt-out" provision, and the settlement involves claims for money damages, the District Court's class certification decision did not provide the minimal due process protections the Supreme Court deemed so fundamentally important in Hansberry and Shutts.

The Eighth and Ninth Circuit Courts of Appeals are not alone in struggling with divergent authority in this area before and after Ticor and Shutts. Nor is the apparent disagreement among the circuit courts restricted to antitrust class actions. The Eleventh Circuit in In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987), for example, considered the issue of mandatory class certification. Greenman involved allegations of fraud, violations of various securities acts, and RICO counts against Greenman, a broker, Merrill Lynch, Paine Webber, and Barclay. A number of investors filed suit. The individual suits were enjoined and a class action was certified under Rule 23(b)(1). Id. at 1541. After a year and a half of discovery, the parties began to negotiate a settlement. At the parties' request, the court participated in the settlement process. Eventually a settlement was reached, conditioned on the court certifying a Rule 23(b)(1) class. A group of plaintiffs brought an appeal challenging the certification, contending that the case should only be certified as a Rule 23(b)(3) class, allowing opt-outs. After reviewing the district court's finding, the Eleventh Circuit reversed the Rule 23(b)(1) certification, expressly commenting on the due process concerns:

> The identity of judicial action that creates "inconsistent or varying adjudications" [under Rule 23(b)(1)] is not clear. Many courts confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. . . . Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be

> certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3). . .
>
> Since the plaintiffs sought compensatory damages, the district court erred by certifying the class pursuant to (b)(1)(A).

829 F.2d at 1544-45 (citations omitted). Here, this Court should review the decisions below and give the federal courts the guidance in this area it attempted to provide in Ticor.

II. THE RULINGS BELOW CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS.

A. The Decisions of The District Court.

Mandatory, non-opt out class certification

As discussed, the Rule 23(b)(1) certification was error, failed to comport with decisions of this and other courts, and furthers the dispute among the courts of appeals regarding the availability of opt out rights in such cases.

Inadequate notice

In Alexander v. NFL, 1977 WL 1497 (D. Minn. 1977), the court ordered plaintiffs to send written notices by mail to class members and to publish notice in several national sports trade magazines and wire services and to take other extensive measures to publish information. The objectors in Alexander had more than 12 weeks to prepare objections to the proposed settlement. Conversely, the District Court here ordered mailed notice, publication in one national (non-trade) newspaper and allowed class members about 4 weeks to prepare and file objections.

Proper notice requirements in class action cases are necessary due process protections. Shutts, 105 U.S. at 2975. Here, the District Court failed to take adequate steps to ensure that proper notice was given. Not only is one small notice by publication inadequate, but many players (potential objectors to the settlement or class certification) did not receive any mail notice at all. 822 F. Supp. at 1399-1402 (App. 187-95). Further, the short time provided by the District Court for players to find out about the settlement, analyze the lengthy and complex legal documents, retain counsel, and prepare objections did not satisfy minimal due process requirements.

Inadequate Representation

Due process does not permit named plaintiffs or their counsel to trade away the rights of objecting class members in order to secure benefits for themselves. See generally Shutts, 472 U.S. 797 (1985); see also Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) (when an agreement "explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness"); Plummer v. Chemical Bank, 91 F.R.D. 434, 442 (S.D.N.Y. 1981), aff'd, 668 F.2d 654 (2d Cir. 1982) ("disparities must be regarded as prima facie evidence that the settlement is unfair to the class"). Unless absent class members are adequately represented by the class fiduciaries, no class result, judgment or settlement can have res judicata effect. That legal predicate is simple common sense; it also illustrates the critical importance of insuring adequate representation in mandatory, non-opt out classes. Simply put, if representation is inadequate in a mandatory, non-opt out class, an absent class members' only recourse is to object to approval of the agreement. Here, the named plaintiffs and their counsel breached their duty.

Class counsel had a conflict of interest created by their preferential negotiation on behalf of some named plaintiffs at the expense of absent class members.[21] Prior to stipulating to certify a mandatory, non-opt out class, the NFL made a number of vigorous arguments and serious allegations in opposition to class certification, including:

- Class counsel's conflicts of interest between and among plaintiffs stemming from, among other things, the "undeniable conflict of interest between plaintiffs White and ... every member of the proposed class," and class counsel's intimation that two class members would have an "absolute right to opt out of any such damages class [in White] and pursue their individual damages claims";

- Class counsel's conflicts of interest with the NFLPA stemming from the fact that class counsel was concurrently suing members of the White class on behalf of the NFLPA (class counsel's client) while seeking to be an adequate representative of all White class members; and

- Class counsel's conflicts stemming from inconsistent positions taken on behalf of different class members in related cases, namely: class counsel in White who also represented the class in Powell first proposed injunctive class certification to the District Court in Powell, then switched course and moved to decertify the injunctive class, then appealed certification of the mandatory, non-opt out class, arguing that all non-opt out classes are unconstitutional.

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[21] Obviously, an attorney with a conflict of interest cannot adequately represent the class. See, e.g., Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (conflict created when lawyer argued inconsistent legal theories for different clients before the same court); Bachman v. Pertschuk, 437 F.Supp. 973 (D.D.C. 1977).

The District Court was unswayed by such "prima facie evidence" of inadequate representation, instead construing these conflicts as a benefit to the class of class counsel's experience. 822 F.Supp. 1404-05 (App. 202-06). At best, such a finding left undisturbed would suggest that class counsel may litigate both sides of an action, secure fees along the way, and still somehow maintain their fiduciary duty to the class. At worst, that ruling was directly contrary to prior rulings in related litigation. See Lewis v. NFL, 146 F.R.D. 5 (D.D.C. 1992) (class certification denied where class counsel sued class members). In any event, such a result does not square with the mandates of Rule 23. The due process concept of Rule 23 adequate representation is simply not outweighed by any possible "benefit" that would inure to a class represented by counsel that represented interests adverse to the class in the same case.

The class representatives only adequately represented their own interests. They were specifically exempted from the most egregious, restrictive, injunctive provisions of the settlement, and were not subject to the point allocation system for distribution of the monetary provisions of the settlement. The District Court attempted to justify that disparate result by suggesting those players took risks the class did not. 822 F.Supp. at 1423 (App. 259). That reasoning was simply unsupported by the record which showed that the named plaintiffs in the seventeen other lawsuits the District Court improperly enjoined took those same "risks." These "disparities must be regarded as prima facie evidence that the settlement is unfair to the class." Plummer, supra. Cf. In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 1995 WL 223209 (3d Cir. April 17) (named plaintiffs who secured benefits for themselves not available to absent class members failed to meet adequacy of representation requirement; class counsel failed to adequately represent absent class interests; settlement unfair and inadequate; district court erred in accepting unreasonably high estimate of

settlement's true worth). "Thus, we must be concerned that [named plaintiffs] had no incentive to maximize the recovery of the [absent class members']; they could skew the terms of the settlement to their own benefit." Id. at *29. This Court should review whether the District Court committed reversible error under these circumstances.

Failure to approve a fair, reasonable and adequate settlement

A class settlement must be fair, reasonable and adequate. Van Horn v. Trickey, 840 F.2d 604, 606-07 (8th Cir. 1988). The District Court failed to properly apply that standard, and the Eighth Circuit erred in failing to reverse.

True free agency for all players is simply not achieved by this agreement; yet, that was the specific goal of every player who brought these suits. See 41 F.3d at 405 ("players' desire for complete free agency"). But this agreement will allow the NFL to continue to restrict player movement and be compensated for losing coveted players, just like each of the "old," illegal systems of player restraint. Nor was fair, reasonable or adequate compensation secured for the class by this agreement. A settling defendant's ability to pay an amount larger than that provided for in a settlement offer is a proper factor to consider in evaluating the fairness of a settlement agreement. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1295 (9th Cir.), cert. denied, 113 S.Ct. 408 (1992); accord Roberts v. Heim, 130 F.R.D. 430, 439 (N.D. Cal. 1990). The financial depth of the NFL in this multi-billion dollar industry has never been in issue.[22] If the rights of certain class members have not been given adequate consideration or

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[22] Notably, the District Court appointed a Special Master in this case but did not charge her with attempting to ascertain whether a "limited fund" existed which possibly might have justified the inadequate monetary settlement achieved. See Eagle-Pitcher and Skywalk, infra.

representation during settlement negotiations, the agreement cannot be deemed fair, adequate or reasonable. Alvarado Partners, L.P. v. Mehta, 723 F.Supp. 540, 546-47 (D. Colo. 1989).

The settlement in this case does not just bode ill for the thousands of NFL players affected by the agreement. The manner in which the District Court failed to insure and protect the interests of absent class members in this multi-billion dollar industry has sweeping implications for the future of professional sports and the rights of its players.

Injunctions

The District Court erred in denying Petitioners' motions to intervene, precluding them from conducting any discovery underlying the complex, voluminous settlement, binding them to a mandatory, non-opt out class, and enjoining them from further or future prosecution of their independently filed lawsuits. Petitioners were forced to blindly accept a voluminous and complicated settlement which they had utterly no involvement in creating, much less any reliable knowledge of how it was created and what was "bargained away" by the class representatives and their counsel, and why. That was error. Burka v. New York City Transit Authority, 129 F.R.D. 80, 83 (S.D.N.Y. 1990) (discovery is relevant to whether court should approve settlement of class action); accord Ross v. A.H. Robins Co., Inc., 700 F.Supp. 682, 683 (S.D.N.Y. 1988); Schwartz v. Novo Industri A/S, 119 F.R.D. 359, 362 (S.D.N.Y. 1988); Welsch v. Gardebring, 667 F.Supp. 1284, 1290 (D. Minn. 1987); In re New Mexico Natural Gas Antitrust Litigation, 607 F.Supp 1491, 1504-05 (D.Colo. 1984); Milstein v. Huck, 600 F.Supp. 254, 262 (E.D.N.Y. 1984).

Moreover, under Shutts and Ticor, if absent class members are not afforded their minimal due process rights, a court's jurisdiction over those absent class members is improper. If that is the case, as it is here, then a court cannot properly enjoin absent

class members from either opting out of the class or pursuing their own claims for monetary relief.

Prior to Shutts, the Eighth Circuit vacated a district court's certification of a Rule 23(b)(1) class in a mass tort action, where the district court sought to enjoin state court cases. In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988, 103 S.Ct. 342 (1982). The Court of Appeals held that to certify a mandatory class violated the Anti-Injunction Act, and discussed the necessity of finding a "limited fund" to justify a non-opt-out class. Id. at 1182-84 (citations omitted). After Shutts, it is clear that such non-opt-out damages classes violate minimum due process requirements. No such "limited fund" determination was ever made by the District Court in this case.[23] That, as well as other rulings of the District Court, was error.

The District Court's denial of Petitioners' motion to intervene violated Rule 23. See Croyden Associates v. Alleco, Inc., 969 F.2d 675, 678-80 (8th Cir. 1992). In Croyden, the Eighth Circuit held that an absent class member has standing to appeal from an order approving a class settlement between the named parties if that absent class member moves to intervene. Id. at 678, citing Guthrie v. Evans, 815 F.2d 626, 627-28 (11th Cir. 1987). Croyden observed the holding in Guthrie that there was no need to allow an absent class member to appeal a class settlement because there are three options generally available to absent class members. They can: (1) move to intervene; (2) collaterally attack the settlement by filing a separate lawsuit; or (3) opt out of the class if the class is certified under Rule 23(b)(3). Croyden at 678.

The Eighth Circuit recognized in Croyden that the absent class member in that case could not have exercised each option

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[23] Unlike other cases such as In Re Joint E. & S. Dist. Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32, 38-39 (E.D.N.Y. 1990), in which Special Masters were specifically charged to make a determination of whether a limited fund existed, the District Court in this case never assigned those duties to the Special Master, and a limited fund determination simply was never made.

set forth in Guthrie, including opting out of the class, because the class was certified under Rule 23(b)(1) and (2). Guthrie recognized that the third option existed only if the class had been certified under 23(b)(3). Therefore, the only option available to the absent class member in Croyden was to move to intervene. Croyden at 680. That too was the only option available to Petitioners here since the District Court erred in enjoining Petitioners from prosecution of their claims. Indeed, the District Court cited Croyden in denying Petitioners' motions to intervene, see White, 822 F. Supp. at 1432, but failed to afford Petitioners either of the other two options discussed in Guthrie or the protections afforded under Ticor and Shutts. Worse, the decision of the Court of Appeals in this case forced Petitioners into a "no win" situation by creating a broad rule which will likely have a sweeping affect on the administration of federal class actions. While courts hold that intervention is a jurisdictional prerequisite to appeal, the Appellate Court here now holds that by moving to intervene, "absent class members" are no longer such and are no longer entitled to due process.

B. The Decisions of The Court of Appeals.

The decision of the Appellate Court below exemplifies the divergent decisions which this Court sought to resolve in Ticor. The Court can now resolve that issue here.

The Court of Appeals in this case acknowledged the significance of the constitutional principle articulated in Ticor, but then failed to properly address the issue. Following receipt of numerous notices of appeal, the Eighth Circuit issued a briefing schedule on October 18, 1993. By order dated February 28, 1994, the Appellate Court (on motion by Petitioners here) suspended the briefing schedule pending a ruling by this Court in

Ticor. The Appellate Court further directed the parties to inform it of this Court's decision in Ticor as soon as it became available.[24]

Despite unequivocal recognition of the significance of the constitutional rule pending decision by this Court in Ticor, the Appellate Court below erroneously failed to reach the issue. Instead, the Appellate Court reasoned that because none of the Petitioners who intervened (on a narrow and limited basis) before the District Court were "absent class members" as a procedural and jurisdictional matter, the Ticor issue could be avoided. 41 F.3d at 406-07 (App. 12-14).

None of the Petitioners were "absent" class members, the panel reasoned, because each had International Shoe[25] "minimum contacts" with the District of Minnesota, or voluntarily submitted to the jurisdiction "by appearing through counsel to contest the merits of the settlement." Id.[26] Those acts, the panel reasoned, were analogous to cases where waiver of personal jurisdiction has occurred "when a party had actively participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions." Id., citing Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990) (citing Marquest Medical Prods. v. EMDE Corp., 496 F.Supp. 1242, 1245 n. 1 (D. Col. 1980)).[27] Accordingly, the

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[24] Each of the parties here were also fully aware of the practical and broad significance of a dispositive ruling by this Court in Ticor. In fact, most of the Petitioners and Respondents now before this Court were amici in Ticor.

[25] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[26] The Appellate Court's finding, that the All-Writs Act authorized the District Court to enjoin the separate lawsuits filed by Petitioners, failed completely to address how the District Court's injunctions square with the Anti-Injunction Act discussed in Skywalk, supra, or with the mandates of Shutts, Ticor and Rule 23(b)(3).

[27] Neither Yeldell, nor any of the authority cited by it in the relevant passage cited by the panel, concerns class actions. In any event, that decision is not germane to the issue here for a number of reasons. Foremost, appellants in Yeldell actively participated in all aspects of the litigation, thus giving rise to the determination that they waived their jurisdictional concerns

panel held, the District Court properly exercised *in personam* jurisdiction over each class member and, as such, was empowered to enjoin any objector from opting out and suing the NFL.

The broad constitutional implications that may be drawn from the panel's decision are that an absent class member may never challenge a district court's denial of its constitutionally guaranteed right to opt out of certain class actions without risk of forever losing its absent class member status. That decision contravenes the constitutional guarantees recognized by the Supreme Court in Shutts. Further, it creates a new ("Catch-22") precedent by which federal district courts in class actions may avoid fully considering the propriety of mandatory, non-opt out classes. This Court should review this case and decide whether that precedent should stand.

Contrary to the precedent now established by the Appellate Court in this case, an absent class member should not lose his status as such merely by appearing in the forum in order to preserve his appellate rights and challenge the unconstitutional denial of his right to opt out. Class action scholars concur:

> Thus, Shutts confirmed that class actions are an exception to traditional due process principles governing personal jurisdiction, and, in validating the opt-out procedure, announced a general rule of what process is due in class actions predominantly seeking a money judgment, whether or not class members are otherwise within the personal jurisdiction of the forum for purposes of reaching a binding judgment in a nonclass action.

– unlike the Petitioners here who were enjoined from prosecuting their own litigation or participating in the White litigation in any way, including discovery. See 822 F.Supp. at 1429 (App. 277).

H. Newberg & A. Conte, Newberg on Class Actions §1.16, at 1-43 (3d. ed. 1992) (emphasis added, citations omitted).

The Court of Appeals was mistaken in its apparent belief that the simple phrase "absent class member" means anything more than "a non-named class member." Its decision only fuels the apparent confusion surrounding this term, and improperly shifts the relevant inquiry in such cases. [28]

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[28] See Newberg §1.04, at 1-14 ("This focus of party status of absent class members is only of limited value, because it begs the underlying issue concerning whether the procedure or rule applies to persons who are not physically before the court, who are not named, identified parties to the suit, and who are interested or involved solely because they share a common issue in controversy with a named party, and the court has determined that named party will adequately represent their interest. Justice Powell's dissenting opinion in Roper emphasizes the risks of uncertainty and confusion that arise in trying to determine the implications of rights of the representative or of class members by focusing on whether absent members are parties or are present for some purposes and not for others." (emphasis in original, citations omitted)).

CONCLUSION

Upon the foregoing, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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Dated: April 19, 1995

SUPPLEMENTAL APPENDIX

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to

the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Nos. 94-1749, 1750

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*, MARK DUSBABEK, *et al.*,

Petitioners,

—v.—

REGGIE WHITE, *et al.*,

Respondent/Plaintiffs,

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondent/Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the lower courts erred in finding that Petitioners submitted to personal jurisdiction by filing appearances and voluntarily challenging the merits of a proposed class action settlement agreement.

2. Whether, as a matter of fact, Petitioners waived any due process challenge to the District Court's certification of a Rule 23(b)(1) non-opt-out class.

3. Whether the District Court's approval of a class action settlement agreement as fair, reasonable and adequate to class members, and the Court of Appeal's affirmance of that approval, constituted an abuse of discretion.

PARTIES TO THIS PROCEEDING

The Petitioners in this proceeding are eighteen individual class members out of a class of over 5,000. They are Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Matthews, and Van Waiters (the "California Objectors"); Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, and Gregory Scales (the "Viking Objectors"); Maurice Hurst, John Fourcade, and Byron Evans. Petitioners appeared and voluntarily objected to the merits of a class action settlement in proceedings before the United States District Court for the District of Minnesota, and were appellants before the United States Court of Appeals for the Eighth Circuit.

Respondent/Plaintiffs Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson were plaintiffs and class representatives in the proceedings before the District Court, and appellees before the Court of Appeals.

Respondent/Defendants the National Football League and its twenty-eight member clubs ("NFL") were defendants in the proceedings before the District Court, and appellees before the Court of Appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1749, 1750

SEAN JONES, *et al.*, MARK DUSBABEK, *et al.*,

Petitioners,

—v.—

REGGIE WHITE, *et al.*,

Respondent/Plaintiffs,

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondent/Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT/PLAINTIFFS IN OPPOSITION

RULES INVOLVED

Certification and settlement of the class action below was carried out pursuant to Federal Rule of Civil Procedure 23.

STATEMENT OF THE CASE

Introduction

Petitioners—18 individual members of a class of more than 5,000—seek this Court's review of orders of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota, approving as fair, reasonable, and adequate a class action stipulation and settlement agreement (the "Settlement Agreement") between Respondent/Defendants, The National Football League and its 28 member clubs (the "NFL"), and Respondent/Plaintiffs Reggie White, *et al.*, on behalf of themselves and a class of current and former professional football players (the "Class").[1]

Although petitioners try mightily to portray this action as raising the same constitutional issue which this Court initially granted certiorari to review in *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994), that due process issue was never reached or decided by the Court of Appeals below. *See White v. National Football League*, 41 F.3d 402 (8th Cir. 1994). To the contrary, the Court of Appeals unanimously affirmed the District Court's decision on the more narrow grounds that: (i) Petitioners had waived any due process objections because they had submitted themselves to the

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[1] The Settlement Agreement is the cornerstone of a global litigation settlement resolving six years of litigation, including two dozen separate lawsuits, between the NFL and professional football players. The Settlement Agreement, which has been operating successfully in the NFL for the past two seasons, has provided these players for the first time in history with a comprehensive system of meaningful free agency; and further provides monetary relief, in the amount of $115 million, to class members who were injured as a result of the player restrictions that were in place in the NFL from 1989 through 1992. The new free agency system created by the Settlement Agreement has now been included in a Collective Bargaining Agreement ("CBA"). The CBA was overwhelmingly approved by more than 96% of the NFL players who voted. *White v. National Football League*, 836 F. Supp. 1458, 1467 (D. Minn. 1993).

District Court's jurisdiction by voluntarily litigating the *merits* of the Settlement Agreement (as opposed to just contesting jurisdiction); and (ii) the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. Neither of these fact-specific determinations presents any conflict with the decisions of this Court or any circuit court; nor do they present any significant issue of law that would warrant a grant of certiorari in this case.

The *White* Case And Its Predecessors

On September 21, 1992, Respondent/Plaintiffs commenced the *White* case on behalf of themselves and a class of professional football players against Respondent/Defendants, the NFL and its twenty-eight member clubs. The complaint initially sought only injunctive relief, but was later amended to also seek antitrust damages arising out of, *inter alia*, the operation of various restraints on competition for NFL player services, including the so-called "Plan B" right of first refusal/compensation ("RFR/C") rules, the college draft, the Uniform NFL Player Contract and the NFL's pre-season pay rules. *See White v. National Football League*, 836 F. Supp. 1458, 1462 (D. Minn. 1993).[2] Defendants answered the *White* complaint, denying all material allegations and asserting various affirmative defenses. *Id.* Thereafter, plaintiffs moved for a preliminary injunction to prohibit the continued imposition of the Plan B rules or any similar restrictions, and to permit players whose contracts expired to sell their services to other NFL

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[2] Under the Plan B RFR/C rules which were in effect for the 1989 through 1992 NFL seasons, each NFL club "restricted" 37 veteran players, whether or not those players remained under contract to the team. Pursuant to Plan B, a team had the right to match any offer made by another NFL club to one of its restricted players (the right of first refusal); further, if the player's former club did not choose to match such an offer, the old club was entitled to receive "compensation" from the acquiring club in the form of one or more draft choices from the NFL's college draft. *White v. National Football League*, 822 F. Supp. 1389, 1480 (D. Minn. 1993).

teams. *White v. National Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

The *White* action followed closely on the heels of two other lawsuits previously filed in the United States District Court for the District of Minnesota challenging the Plan B RFR/C rules. On September 10, 1992, following a three month trial before Judge David S. Doty, the jury in *McNeil v. NFL*, 4-90-476 (D. Minn.)—a lawsuit brought by eight professional football players against the NFL and its member clubs—found that the Plan B RFR/C rules violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they: (i) substantially harmed "competition in the relevant market for the services of professional football players"; and (ii) were "more restrictive than reasonably necessary." *White*, 822 F. Supp. at 1398. The jury found that all eight *McNeil* plaintiffs suffered antitrust injury, but awarded damages to only four. *Id.*

Shortly after the jury returned its verdict in *McNeil*, ten individual NFL players who had not signed contracts for the already commenced 1992 NFL season brought an antitrust action against the NFL and its clubs seeking, *inter alia*, injunctive relief, to stop the Plan B rules from being applied to them. *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992). On September 24, 1992, Judge Doty issued a temporary restraining order against the continued operation of Plan B, thereby permitting those ten players to sign contracts with any NFL clubs. *Id.* at 235.

Each of the above cases, as well as numerous other suits brought by individual NFL players against the NFL Clubs, were financially supported by the National Football League Players Association ("NFLPA"), which is currently the collective bargaining representative for all NFL players.[3]

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[3] After the Eighth Circuit ruled on November 1, 1989, in *Powell v. NFL*, 930 F.2d 1273 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), that previously agreed to player restrictions were exempt from antitrust challenge as long as the players continued to be represented by

The Global Litigation Settlement

On January 6, 1993, the parties to *White*, *McNeil*, *Jackson* and over twenty other lawsuits involving professional football players and NFL teams reached agreement in principle on a global settlement of these lawsuits, with the *White* class action settlement as its centerpiece. *White*, 822 F. Supp. at 1435.

By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the District Court in *White* certified, for the purposes of settlement, a damages and injunctive relief class, pursuant to Fed. R. Civ. P. 23(b)(1), consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

On February 26, 1993, the plaintiffs and defendants in *White* formally entered into the class action Settlement Agree-

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a union, a majority of NFL players voted to terminate the NFLPA's union status. Thereafter, the NFLPA was reconstituted as a professional association, which financed and supported litigation by players against the NFL, such as the *McNeil* and *White* actions, aimed at ending unreasonable restrictions on players' freedom of movement.

After an agreement in principle was reached settling the *White* class action, the NFLPA sought once again to become the collective bargaining representative for NFL players. *White*, 822 F. Supp. at 1396. Subsequently, the NFLPA was authorized by a majority of NFL players to represent them for purposes of collective bargaining, and by letter dated March 29, 1993, the NFL recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future NFL players. *Id.* at 1397, 1435.

ment. In addition, the parties to the related NFL player lawsuits being supported by the NFLPA reached agreements to separately settle those actions. *White*, 822 F. Supp. at 1395-96. The concurrent resolution of the *White* class action with twenty-three related lawsuits supported by the NFLPA brought an end to seven years of litigation between the NFL teams and their players.

Proceedings Before the District Court

The District Court evaluated the *White* Settlement Agreement using "the two-stage procedure suggested in the *Manual for Complex Litigation*, § 30.44, at 241-42 (2d ed. 1985)." *White*, 822 F. Supp. at 1399. First, after a preliminary hearing on February 26, 1993, at which a few class members appeared in opposition to the Settlement Agreement, the District Court determined that "the proposed settlement fell within the range of possible approval." *Id.* Second, the District Court ordered that notice of the Settlement Agreement, which provided that objectors would have an opportunity to appear and be heard at a final approval hearing, be mailed to individual class members and published. *Id.*

Pursuant to the Court's order, plaintiffs mailed notice of the Settlement Agreement to over 5,000 class members at their last-known addresses, and published notice of the agreement in the *USA Today* newspaper. *Id.* at 1400. In response, 58 class members, one player agent, and one defendant submitted briefs and affidavits in opposition to the Settlement Agreement on or before the April 2 deadline reflected in the notice. In addition, the District Court accepted and considered briefs and affidavits on behalf of thirty other class members who submitted their briefs after this deadline. In total, more than 50 briefs and affidavits, comprising thousands of pages, were submitted by both supporters and opponents of the Settlement Agreement for the District Court's review. *Id.* at 1424-25.

On April 16, 1993, the District Court held a final approval hearing, at which parties and class members were given the opportunity to be heard in support of or in opposition to the Settlement Agreement, irrespective of whether they had previously submitted their positions in writing. At the hearing, which lasted over ten hours, parties and objectors presented oral argument, and witnesses, who were subject to cross-examination, testified in favor of, or against, the Settlement Agreement. *Id.* Each of the Petitioners herein submitted briefs attacking the merits of the Settlement Agreement and voluntarily appeared, in person or through counsel, at the final approval hearing to contest the merits of the Settlement Agreement.

Based upon an exhaustive review of the record before him, on April 30, 1993, Judge David S. Doty issued a 115-page Order in which he found that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. Among the benefits to the Class found by the District Court were: (i) a "radically modified player reservation system," pursuant to which almost all players with at least five years of experience (four, if a salary cap is in place) would have the opportunity to become unrestricted free agents (822 F. Supp. at 1419); (ii) substantially increased "tender" requirements before a club could limit the free agency rights of those players still subject to some restrictions (*id.*); (iii) significantly reduced restrictions on those players who are still subject to free agency limitations (*id.*); (iv) a greatly reduced number of rookies subject to the NFL's college draft, due to a reduction in the number of rounds of the draft from twelve to seven (*id.*); (v) strict anti-collusion provisions, to deter and punish collusion by or between the NFL and its teams (*id.*); (vi) guaranteed annual payments to players in salaries and benefits of at least fifty-eight percent of defined revenues (in any year in which there is a salary cap), the highest such guarantee in professional team sports; and (vii)

settlement payments to class members of $115 million ($17 million of which has already been distributed (*id.*)).[4]

In addition, the District Court found, *inter alia*, that: (i) objections to specific provisions of the Settlement Agreement by a small number of class members did not merit disapproval because the "Agreement as a whole is fair, reasonable and adequate to the class" (822 F. Supp. at 1426); (ii) mail and publication notice to the Class satisfied "the requirements of [Fed. R. Civ. P.] 23 and due process" (*id.* at 1402); (iii) the plaintiffs and class counsel "competently and vigorously represented the interests" of the Class (*id.* at 1405); and (iv) the individual objectors had waived any due process objections to a non-opt-out class and submitted to the court's jurisdiction, because they did not confine "their arguments to the claim that they [were] beyond the court's jurisdiction" bu. rather "objected to the merits of the proposed settlement" (*id.* at 1432).

Following preliminary approval, the unprecedented free agency system created by the Settlement Agreement became effective. 822 F. Supp. at 1420. As a result, class members have already enjoyed the substantial benefits of this new system for more than two years. During this period, hundreds of NFL players have switched clubs as Unrestricted Free Agents; many more Restricted Free Agents have received offers from other teams than ever did under Plan B; and average player salaries throughout the NFL have increased by more than fifty percent, providing hundreds of millions of dollars in addi-

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[4] In addition, it was agreed that the named plaintiffs in *White* and *Lewis v. NFL*, Civ. A. No. 91-2685 (D.D.C.), would receive the following amounts: Reggie White - $0; Michael Buck - $134,805; Vann McElroy - $470,194; Hardy Nickerson - $494,836; Albert Lewis - $711,600; and Wayne Radloff - $214,115. The named plaintiff for pre-season pay claims, Dave Duerson, will receive $98,302. These sums reflect the amount of damages these plaintiffs would have sought at trial, before trebling, and will not be paid from the $115 million *White* Settlement Fund. *White*, 822 F. Supp. at 1415.

tional compensation to class members. *See White*, 836 F. Supp. at 1479-80.

In addition to the new free agency system, and the $115 million in damages paid into the *White* Settlement Fund, substantial additional benefits to class members were provided by other parts of the global litigation settlement, as set forth below:

Back Pay - The settlement of *NFLPA v. NFL Management Council*, a lawsuit commenced on behalf of all NFL players who were denied one week's pay after returning to work at the end of the 1987 players' strike, provided for payment by the NFL to the striking players, all of whom are *White* class members, of $30 million. *White*, 822 F. Supp. at 1415.

Individual Player Lawsuits - In addition to the *McNeil* and *Jackson* cases, there were eight other lawsuits by individual players, supported by the NFLPA, that predated the *White* class action. These lawsuits challenged the legality of Plan B and other restrictions on player employment. All of these cases, plus *McNeil, Jackson, Lewis* and *Powell*, were found to have contributed substantially to the ability of class counsel to negotiate the *White* Settlement Agreement on terms highly favorable to the Class. *White*, 822 F. Supp. at 1405, 1407. The related player actions were settled separately for payments totalling $19,028,628. *Id.* at 1416.[5]

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[5] The other player lawsuits settled at this time included: *Joyner v. NFL*, Civ. No. 92-2876 (E.D. Pa.); *Allen v. Chargers Football Co.*, Civ. No. 91-4322 (C.D. Cal.); *Hebert v. Los Angeles Raiders*, Civ. No. S023546 (Sup. Ct. Cal.); *Solomon v. NFL*, Civ. No. 92-1244-F (D. Tex.); *Morris v. New York Giants, Inc.* (Arbitration before Hon. Bernard S. Meyer); *Chandler v. Indianapolis Colts, Inc.*, Civ. No. 54601-9009-CP-0453 (Ind. Cir. Ct.); *Mullin v. Los Angeles Rams Football Co.*, No. B063729 (Cal. Ct. App.); *Tice v. Pro Football, Inc.*, Civ. No. 91-2314 (D.D.C.); *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), No. 91-3430MN (8th Cir.); *Five Smiths v. NFLPA*, Civ. No. 4-90-261 (D. Minn), No. 92-2118MN (8th Cir.); and *NFL v. NFLPA and Hilton*, Civ. No. 4-91-877 (D. Minn.).

Reimbursement To The NFLPA Of Litigation Expenses- All of the actions mentioned above, including *McNeil, Jackson, Lewis* and *White*, were funded by the NFLPA. As part of the global litigation settlement, the NFL Clubs agreed to pay the NFLPA, for the benefit of NFL players, $18,847,520, as partial reimbursement for the attorneys' fees, disbursements and other expenses it incurred to support the *McNeil* case, the *White* case, and all related player lawsuits. *White*, 822 F. Supp. at 1416.[6]

When considered with the $115 million that will be directly distributed as part of the *White* settlement, a total of $195 million will be disbursed for the benefit of NFL players.

On May 6, 1993, the NFL and the NFLPA reached agreement on the terms of a new collective bargaining agreement (the "CBA"). The CBA incorporated most of the terms of the *White* Settlement Agreement relating to the new free agency system. In addition, as a result of the CBA, the NFL defendants and class counsel agreed to amend a few specific provisions of the *White* Settlement Agreement, and class plaintiffs moved the District Court to approve these amendments. *White*, 836 F. Supp. at 1469. The CBA was subsequently ratified by 96% percent of the NFL players who voted on ratification. *Id.* at 1467, 1485.

The District Court held a preliminary approval hearing on the proposed amendments to the Settlement Agreement on

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[6] In addition, as part of the global litigation settlement, the parties to various lawsuits between and among the NFLPA, NFL Properties, Inc. (the NFL's licensing arm), various individual players, and various NFLPA and NFL Properties licensees, also reached a settlement of their lawsuits, under which the right of NFL players to engage in group licensing through the NFLPA was preserved and recognized. In addition, the NFLPA received $10 million in settlement payments and a guarantee of at least $5 million a year in additional licensing revenues from 1993 through 1999. All of the monies received by the NFLPA pursuant to this settlement will be distributed to, or used directly for the benefit of, NFL players. *White*, 822 F. Supp. at 1415-16; *White*, 836 F. Supp. at 1476.

June 1, 1993. Notice of the hearing was provided to all class members, including Petitioners, who had previously objected to approval of the Settlement Agreement. In an order dated June 2, 1993, the District Court preliminarily approved the proposed amended Settlement Agreement, ordered that notice again be mailed to class members and published, and gave all class members the opportunity to object in writing to the proposed amended Settlement Agreement. Plaintiffs thereafter mailed notice to the over 2,500 class members who were likely to be affected by the amendments to the Settlement Agreement and once again published notice in *USA Today*. *White*, 836 F. Supp. at 1469.

Twenty-eight class members, all of whom had previously objected, and one defendant, submitted briefs and affidavits in opposition to the amended Settlement Agreement. A second "final" approval hearing was held on July 7, 1993, during which class members were again given the opportunity to present oral argument and testimony in opposition to the amended Settlement Agreement. *Id.* at 1470. After considering all of the evidence and arguments presented, on August 20, 1993, the District Court entered a 116-page order in which the Court reaffirmed its prior order and concluded that the amended Settlement Agreement, as a whole, was in the best interests of the Class and should be approved.

Proceedings Before the Court of Appeals

On appeal, the Eighth Circuit affirmed the District Court's determination that the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. *White*, 41 F.3d at 408. Further, the Court of Appeals unanimously held that "each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *Id.* Based on this factual determi-

nation of waiver, the Court of Appeals found it unnecessary to "reach the [constitutional] issue raised by the objectors" regarding "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." *Id.*

The Court of Appeals also rejected the claim by certain objectors that "the named plaintiffs and their counsel inadequately represented the class." *Id.* To the contrary, the Court of Appeals found "substantial evidence that the settlement agreement provides significant benefits to the class" from which the District Court "reasonably concluded that the interests of the plaintiff class were protected by the settlement agreement." *Id.* In addition, the Court of Appeals held that "class members received adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class." *Id.* at 408-09.

An order denying the motion by certain Petitioners for rehearing *en banc* was entered by the Court of Appeals on January 20, 1995.

ARGUMENT

THE FACT-SPECIFIC, UNANIMOUS DECISION OF THE COURT OF APPEALS APPROVING THIS CLASS ACTION SETTLEMENT AGREEMENT DOES NOT RAISE ANY ISSUE WARRANTING THIS COURT'S REVIEW

The decision of the Court of Appeals does not present any "special" or "important" question of federal law which would warrant review by this Court. Supreme Court Rule 10. There is no conflict with the decisions of any circuit or the prior decisions of this Court. Nor is there any legal question of exceptional importance resolved by the decision below.

Contrary to the claims of Petitioners, their "due process" challenge to the application of a Rule 23(b)(1) class certifi-

cation to absent class members was never decided by the Court of Appeals below. Instead, all that the Court of Appeals did, in a unanimous opinion, was apply well-established authority to: (i) affirm, as a factual matter, that the individual objectors had waived their due process argument by voluntarily appearing and challenging the *merits* of the *White* Settlement Agreement; (ii) determine that the notice to the Class was proper and that the Class was adequately represented; and (iii) determine that the District Court did not abuse its discretion in concluding that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. *White*, 41 F.3d 402. None of these fact-based determinations present any issue warranting review by this Court.

A. This Case Does Not Properly Present Any Constitutional Issue Concerning The Application Of Rule 23(b)(1) To Absent Class Members

Petitioners claim to be seeking review of the application of this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to a Rule 23(b)(1) class action. That due process issue, however, was never reached or decided by the Court of Appeals below, and thus is not properly presented by the petitions. Rather, the Court of Appeals simply applied well-established authority to conclude that, as a factual matter, each of the objectors had, by their actions, subjected themselves to the jurisdiction of the District Court (thus precluding any due process objections).

"It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984), and cases cited therein. It thus has been this Court's uniform "practice to avoid the unnecessary decision of novel constitutional questions" when there exists a sufficient non-constitutional basis for resolving a dispute. *See*

Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979); *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994). As the Court of Appeals concluded, a non-constitutional basis for the decision below (waiver) exists here, and thus there was and is no need to reach the due process issue asserted by Petitioners.

Petitioner's constitutional argument is premised upon the decision in *Shutts*, where this Court determined that, in a class action "wholly or predominantly for money judgments," a court could, consistent with due process, bind absent class members, not otherwise subject to the jurisdiction of the court, to a class action settlement, so long as it provided a number of procedural protections, including the right to opt-out. 472 U.S. at 811-12 & n.3. The new constitutional issue asserted by Petitioners is whether, consistent with the holding of *Shutts*, a court may bind absent class members, who are not otherwise subject to the jurisdiction of the court, to a non-opt-out Rule 23(b)(1) class, in which injunctive relief is predominant but money damages are also being sought. The Court of Appeals, however, never decided this constitutional issue because of its factual determination that Petitioners had voluntarily submitted themselves to the District Court's jurisdiction by arguing the merits of the Settlement Agreement.

Specifically, the Court of Appeals unanimously determined, as a factual matter, that each of the Petitioners submitted to the jurisdiction of the District Court, rather than making a special appearance solely to contest jurisdiction. In particular, the Court of Appeals found that "each of the [Petitioners] either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95. Accordingly, the Court of Appeals found that Petitioners had waived any jurisdictional objections to the Rule 23(b)(1) non-opt-out

class so that it was unnecessary to reach the constitutional issue posed by Petitioners. *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95.

There is clearly no conflict between the Court of Appeals' determination that Petitioners submitted to the jurisdiction of the District Court by their decision to argue the merits of the Settlement Agreement, and any prior rulings of this Court or the various circuits. Indeed, this Court has long recognized that personal jurisdiction is a "personal privilege" of a party that may be waived. *See Leroy*, 443 U.S. at 180; *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165, 168 (1939) (the defense of lack of personal jurisdiction is a privilege, and can be lost in a number of ways, including "by failure to assert it seasonably, by formal submission in a cause, *or by submission through conduct*") (emphasis added). Applying this authority, every Court of Appeals has held that a party may submit itself to personal jurisdiction by actively litigating the merits of a case.[7]

Accordingly, the only jurisdictional issue decided by the Court of Appeals, and presented on this appeal, is the factual question of whether, by their actions, Petitioners submitted to

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[7] *See, e.g., Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Datskow v. Teledyne, Inc., Continental Products Division*, 899 F.2d 1298, 1303 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990); *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230, 1236 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 429 (4th Cir. 1986); *Broadcast Music, Inc. v. M.T.S. Enterprises*, 811 F.2d 278, 279 (5th Cir. 1987); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir. 1991); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993); *Alger v. Hayes*, 452 F.2d 841, 842-43 (8th Cir. 1972); *United States v. Vacant Land Located at 10th Street and Challenger Way in Palmdale, Cal.*, 15 F.3d 128, 131 (9th Cir. 1993); *Pipkin v. United States Postal Service*, 951 F.2d 272, 274 (10th Cir. 1991); *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir. 1990).

the jurisdiction of the District Court. It is well-established that this Court will rarely disturb such "findings of fact in which two other courts below have concurred." *United States v. Doe*, 465 U.S. 605, 614 (1984).[8]

The reasons why this Court should not grant certiorari to consider due process issues not reached by the Court of Appeals below are underscored by the recent decision in *Ticor Title Ins. Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359, 1362 (1994). In that case, this Court dismissed a grant of certiorari to consider a similar due process challenge to a non-opt-out class as being improvidently granted because the determination of a non-constitutional question, not addressed in any of the previous proceedings in *Brown*, might have made resolution of the constitutional issue unnecessary. *Id.* at 1361-62. *A fortiori*, any grant of certiorari to consider a due process challenge would be improvident in this case, since the Court of Appeals has already determined that it was not necessary to reach these due process issues.

Petitioners' assertion that the Court of Appeals "of necessity" determined the due process issue for the Class (Petition of Sean Jones, *et al.* ("Jones Pet.") at 3, 11) is without merit. The Court of Appeals merely held that by submitting to personal jurisdiction before the District Court, these individual class members had waived any due process objections. Nothing in the Court of Appeals' opinion would preclude other class members, who did not submit to personal jurisdiction, from arguing in a subsequent action that a Rule 23(b)(1) class cannot preclude their individual damages claims (although, as discussed below, Respondent/Plaintiffs would disagree with such an argument).

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[8] *See also Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949).

B. Even If The Due Process Issue Was Properly Presented, Certification Of This Rule 23(b)(1) Class Would Not Conflict With *Shutts*

Alternatively, if the due process issue had not been waived, certiorari would still be inappropriate because the certification of this class action under Rule 23(b)(1) was wholly consistent with this Court's decision in *Shutts*, which was expressly limited to class actions in which the claims are "wholly or predominantly for money damages." 472 U.S. at 811 n.3. The Petitioners' assertion that *Shutts* implicitly holds that there is a due process right for class members not subject to personal jurisdiction to opt-out of a 23(b)(1) class action, such as this, involving predominant claims for injunctive relief (*see* Petition of Mark Dusbabek, *et al.* ("Dusbabek Pet.") at 11, 12; Jones Pet. at 2, 8) is directly at odds with this Court's "wholly or predominantly" test.

As the District Court found below, "the plaintiff class' claims for structural, injunctive relief 'predominate' over its claims for damages" (*see White*, 822 F. Supp. at 1411; *White*, 836 F. Supp. at 1472). This determination flowed directly from the fact that the principle relief sought and obtained by the Class was the radically new free agency system created by the Settlement Agreement. Such a non-opt-out class action, which is not "wholly or predominantly" for money damages, does not conflict with *Shutts*.[9]

For the same reason, this case does not present any conflict with the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). The Ninth Circuit in *Brown* expressly

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[9] *See, e.g., Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994); *In re Jackson Lockdown/MCO cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985); 7B C. Wright, A. Miller & M. Kane. *Federal Practice & Procedure* § 1789, at 256 (2d ed. 1986); 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.19, at 1-18.

recognized that the ruling in *Shutts* applied solely to "claims wholly or predominantly for money damages." *Brown*, 982 F.2d at 392. It then went on to hold that the specific 23(b)(1) class at issue before it was subject to the opt-out requirements of *Shutts* because the predominant claims at issue were for monetary relief. Indeed, since the decision in *Brown*, the Ninth Circuit has had occasion to rule that a district court did not abuse its discretion by certifying a non-opt-out damages and injunctive relief class under Rule 23(b)(1), where the claims for money damages did not predominate. *See Arata v. Nu Skin International, Inc.*, 1993 WL 321710 (9th Cir.) (opinion not reported). Where, as here, "a lawsuit (1) combines claims for monetary relief with claims for declaratory or injunctive relief, and (2) the monetary claims do not 'predominate,' . . . no additional notice or chance to opt-out is required in order to satisfy due process requirements." *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994).

The reasons why a right to opt-out for absent class members is not required by due process in the different circumstances presented by a class action in which claims for money damages are not predominant stem from the fact that the protection of the rights of individual class members is much more interdependent with the resolution of the rights of other class members in actions in which substantial injunctive relief is being sought. *See White*, 822 F. Supp. at 1412, *citing* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.20 (3d ed. 1992). This is particularly evident in antitrust class actions brought by professional athletes which seek substantial injunctive relief in order to create a single new, highly interdependent free agency system for all class members. It is thus not surprising that all prior antitrust class action settlements by players in professional team sports, including *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶61,730 (D. Minn. 1977), and *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y.

1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977), have been non-opt-out settlements, which included both a new free agency system (through injunctive relief) and a settlement of damages claims. This long-standing and well-established principle of class action law and practice does not present any conflict with the due process requirements for class actions predominantly seeking monetary damages articulated by *Shutts*.

Petitioners' argument that they should be able to reap the substantial benefits of the new free agency system created by the injunctive relief portion of the Settlement Agreement, while retaining their right to opt-out of the damages part, would make it virtually impossible to settle 23(b)(1) class actions in which claims for injunctive relief predominate. Consider, for example, the enormous benefits received from the new free agency system by petitioner O'Neal, who increased his average yearly compensation by 180% as a free agent; Petitioner Allen, who increased his compensation by 300%; Petitioner Martin, who enjoyed a 120% increase; Petitioner Dishman, who received an 80% increase; and Petitioner Hurst, who reaped a 240% increase.[10] Due process does not require that such class members, who necessarily receive the substantial benefits of the injunctive relief provided by the Settlement Agreement, also be given the right to pick and choose whether they are willing to accept the damages part of the same settlement.

C. The Lower Courts' Approval Of The Settlement Agreement As Fair, Reasonable, And Adequate To Class Members Presents No Issue Warranting This Court's Review

Each of the Petitioners' remaining arguments for certiorari review present challenges to fact-specific determinations by

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[10] These amounts are over and above the substantial damages payments these Petitioners will receive pursuant to the Settlement Agreement, which total over $2.2 million, representing an average payment of over $125,000 to each Petitioner.

the courts below arising out of their approval of the Settlement Agreement. However, this Court has held that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949), and cases cited therein; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").[11] No such "obvious and exceptional" error has been identified by Petitioners.

1. Federal Rule of Civil Procedure 23(e) requires that notice of a class action settlement be provided to all members of a class. It is well settled that the mechanics of the notice process are left to the sound discretion of the district court, subject only to "the broad 'reasonableness' standards imposed by due process," and will not be upset absent a clear showing that the district court abused its discretion. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354-59 (1978) (reviewing class action notice under abuse of discretion standard).

Although the Petitioners challenge the notice to the Class ordered below (*see* Dusbabek Pet. at 14-15), it is clear that these claims are frivolous. The District Court ordered notice by publication in a national newspaper, *and* individualized notice of the Settlement Agreement by direct mail to all identifiable class members. *White*, 836 F. Supp. at 1462, 1466. This Court has held that such notice by mail is the best possible type of notice under the circumstances. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (where names and addresses of class members are readily ascertainable,

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[11] *See also Berenyi*, 385 U.S. at 635; *Branti*, 445 U.S. at 512 n.6; *Rogers*, 458 U.S. at 623 (1982); *Doe*, 465 U.S. 605; *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Goodman v. Lukens Steel Co.* 482 U.S. 656, 665 (1987).

individual notice by mail is "clearly the best notice practicable"). Accordingly, there cannot possibly be an issue worthy of Supreme Court review in the details of the individual notice that both courts below approved.

2. Similarly, Petitioners fail to cite any cert-worthy issue arising out of the Court of Appeals' approval of the Settlement Agreement as fair, reasonable and adequate, and in the best interests of the Class (*see* Dusbabek Pet. at 18-19). To the contrary, all of the Petitioners' claims in this regard are primarily factual in nature and amount to a request for this Court to review those factual findings.

As this Court has repeatedly recognized, the determination of the fairness and adequacy of a class action settlement is principally a factual one left to the discretion of the District Court, which should not be overturned on appeal unless it constitutes a clear abuse of discretion. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 742-43 (1986) ("we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances"); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (reviewing class action certification under abuse of discretion standard). The reason for such deference is that only the district court is "exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Grunin*, 513 F.2d at 123.

In this case, the District Court Judge, David S. Doty, developed a thorough knowledge and understanding of the issues involved in the Settlement Agreement through his experience in presiding over both the *White* action and a host of prior actions in which NFL player movement rules were at issue. Of particular assistance to Judge Doty was his experience in presiding over, and his familiarity with the record in, *McNeil v. NFL*, which included a three month trial which resulted in

over 8,000 pages of trial transcript and over 400 exhibits. *See White*, 836 F. Supp. at 1467 n.24.

In detailed findings of fact, set out in two lengthy and exhaustive opinions, Judge Doty found that the Settlement Agreement provided enormous benefits to the class, both in its creation of a new free agency system—which has led to unprecedented player movement and vastly higher salaries to NFL players—and in its payment of $115 million to class members for injuries arising out of Plan B and other restrictions imposed in the past by the NFL clubs.[12] *See White*, 822 F. Supp. at 1412-14, 1419. After weighing these significant benefits against the prospect of continuing with protracted and risky litigation, as well as the irreparable injury to class members that would be caused by any new set of restrictions that the NFL would likely attempt to impose, the District Court reached the well-supported conclusion that the Settlement Agreement was in the best interests of the Class. *Id.* at 1432. This was particularly true in light of the short careers of most class members, who would be long retired from the NFL before all litigation was complete. *See Jackson*, 802 F. Supp. at 231.

Moreover, the fact that (i) less than 2% of all class members ever objected to the Settlement Agreement, and (ii) the terms of the new free agency system were incorporated almost verbatim in a collective bargaining agreement approved by over 96% of the NFL players who voted on ratification, provides compelling evidence of the overwhelming support

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[12] Between March 1, 1993, when the new free agency rules went into effect, and June 23, 1993, the average salaries of NFL players who signed new contracts more than doubled, exceeding $1 million per year. *White*, 836 F. Supp. at 1479-80. In addition to such huge salary increases, there has been unprecedented player movement under the new free agency system. In 1993, and again in 1994, over 100 NFL players switched clubs as Unrestricted Free Agents. Thus, the marketplace experience under the new free agency system provides "substantial evidence that the Settlement Agreement provide[d] significant benefits to the class." *White*, 41 F.3d at 408 (citing *White*, 836 F. Supp. at 1479-83).

among class members for the Settlement Agreement. This further demonstrates why there is no cause for this Court to grant certiorari to review the lower courts' fact-based approval of the Settlement Agreement.

3. Finally, Petitioners fail to raise any cert-worthy issue in their challenge to the adequacy of class representation. As both lower courts held, "the adequacy of class representation . . . is ultimately determined by the settlement itself." *White*, 41 F.3d at 408; *White*, 822 F. Supp. at 1406.[13] Accordingly, there can be little doubt that such representation was adequate where, as here, the Class received hundreds of millions of dollars in free agency benefits and $115 million in actual damages (in addition to the other substantial benefits provided by the global litigation settlement).

Similarly, there is no reason for this Court to review the Court of Appeals' determination that the fact that "named plaintiffs received additional awards based on their efforts and risks in the case" did not render them inadequate class representatives (*White*, 41 F.3d at 408). As numerous other courts have held, such additional consideration to class representatives who gain substantial benefits for the class is often appropriate and within the sound discretion of the district court to approve. *See Luevano v. Campbell*, 93 F.R.D. 68, 69 (D.D.C. 1981) ("where there are sufficient indications that the class has been treated fairly and that the relief for the named plaintiffs is not excessive, the provision of greater monetary relief for the named plaintiffs than for class members does not warrant disapproval of the settlement").[14] There

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[13] *See also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992).

[14] *See also Thornton v. East Texas Motor Freight*, 497 F.2d 416, 470 (6th Cir. 1974) ; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 710; *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) *aff'd*, 925 F.2d 1464 (6th

was more than an adequate record to support the lower courts' determinations that the class representatives here—who risked retaliation from the NFL to obtain the substantial relief granted to the Class—deserved the limited additional benefits that were provided.

CONCLUSION

For the foregoing reasons, Petitioners have failed to raise any issues that warrant this Court's review and their Petitions for Certiorari should be denied.

Dated: May 22, 1995

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Cir.), *cert. denied*, 502 U.S. 909 (1991); *Lo Re v. Chase Manhattan Corp.*, 19 Fed. Empl. Prac. Cas. (BNA) 1366, 1369 (S.D.N.Y. 1979); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1020 (E.D. Wis. 1984); *Women's Committee v. National Broadcasting Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977).

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Nos. 94-1749 & 94-1750

In the

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents,

MARK DUSBABEK, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

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MOTION OF PUBLIC CITIZEN, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF CERTIORARI

Pursuant to Rule 37.2 of this Court, Public Citizen, Inc. hereby moves for leave to file the accompanying brief *amicus curiae* in support of these petitions. Both sets of petitioners have consented, as has the respondent National Football League and its member organizations. However, counsel for Reggie White and the plaintiff class has refused consent on the ground that the issue addressed in the accompanying brief is not properly presented as a result of the decision of the Eighth Circuit below.

Public Citizen is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its

Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by these petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

For the foregoing reasons, the motion for leave to file should be granted.

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May 22, 1995

ALTERNATIVE QUESTION PRESENTED

The following question is a combination and modification of questions 1, 2 and 9 in the petition in 94-1749 and questions 1 and 2 in 94-1750. *Amicus* believes that its question more precisely states the issue than does those questions. With respect to the other questions in the petitions, *amicus* believes that they are fairly comprised within the rephrased question, or, with respect to question 8 in 94-1749 and question 3 in 94-1950, do not warrant review.

In a federal antitrust action involving claims for both injunctive relief and individual claims for substantial money damages, may a federal court, consistent with Rule 23 and the Due Process Clause, certify a class and approve a settlement in which the individuals are not afforded a right to opt out on their claims for money damages?

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BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

INTEREST OF AMICUS

Public Citizen, Inc. is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two

cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by the petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

STATEMENT OF THE CASE

The fundamental issue raised by these petitions is how federal courts should reconcile the interests of individual class members and the class as a whole when a class complaint seeks both injunctive relief and substantial money damages. In particular, the issue, which has engendered considerable confusion in the lower courts, is whether a right to opt out must be accorded where both injunctive relief and substantial money damages are sought.

There are two polar positions, which we reject, and a middle ground which we support. On one end of the spectrum is the position adopted by the district court: in cases seeking "predominately" injunctive relief, there is no right to opt out. On the other end is the position that, if there are substantial claims for money damages, the class members must be given an opt out as to all claims. Our position is in the middle: there need be no opt out for the injunctive relief claims, but Rule 23 and the Due Process

Clause require an opt out for substantial individual claims for money damages. Before explaining how we arrive at that result and why review is warranted, it is necessary to highlight certain facts regarding these proceedings that are not fully set forth in the petitions.

After a series of antitrust actions against the respondent National Football League ("NFL") by present and former players were filed, and in some cases tried, this action was filed in the District of Minnesota on September 21, 1992, as a class action, initially seeking only injunctive relief. The basic claim was that certain NFL practices regarding player contracts—restrictions on players moving from one club to another (known as Plan B), the college draft, the standard NFL player contract, and the pre-season pay rules—violated the federal antitrust laws. The complaint sought an order directing the NFL to restructure its rules so as not to violate those laws. Thereafter, the complaint was amended to add a separate class claim for money damages, which are trebled under the antitrust laws.

In early 1993, a settlement was reached on the injunctive and damages claims, both on a class-wide basis, with certain limited exceptions described below. The class included all current and former NFL players (back to August 31, 1987), as well as all future college players who might seek to play in the NFL. Since the agreement essentially rewrote the rules governing the relationship between the NFL and the players—present, past,and future— the named parties insisted, and we agree (although petitioners may not), that the injunctive class had to include everyone, with no right to opt out: there had to be one set of rules for everyone if there was to be a contract at all between the NFL and the players.

As part of the settlement, the League naturally wanted to resolve all of the pending claims for money damages against it, as well as any other claims that might be brought thereafter relating to its prior rules. Thus, the class was defined to include all former, present, and future NFL

players who had any claims dating from August 31, 1987, to the date of the final approval of the settlement. Although all present and future players would be bound by the structural changes, there was less than complete identity between those class members governed by the injunctive relief and those who were theoretically eligible to sue for damages.

First, college athletes, who had yet to seek to play in the NFL, plainly had no claim for damages for conduct occurring while they were still in college. Second, some of the players who had damages claims were no longer in the League, and hence the new rules on player contracts, as well as benefits, such as injury protection, worker's compensation, and moving and travel expenses, would be irrelevant to them. Third, there were certain key dates, the most significant being November 6, 1989, when the National Football League Players Association ("NFLPA") ceased being the certified bargaining agent of the players, after which the NFL's antitrust defenses based on the prior collective bargaining agreement were seriously weakened. Fourth, some of those current players who were eligible to file damages claims might have unique defenses applicable to them, such that they might benefit only from the injunctive relief, or they might have varying degrees of difficulty in proving money damages.[1]

Despite these differences in class composition, the court nonetheless certified a single class, with no subclasses, under the mandatory provisions of Federal Rule of Civil Procedure 23(b)(1). In doing so, it relied principally on subpart (A) of that Rule, which provides for non-opt out classes where "the prosecution of separate actions by or against individual

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[1]For example, in *McNeil v. NFL*, 1992-2 Trade Cas. (CCH ¶ 69,682)(D. Minn. 1992), the jury found that the NFL had violated the antitrust laws, but four players were awarded *no* damages, and four others were awarded damages ranging from $50,000 to $240,000, before trebling. Pet. App. 183, n.14.

members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class ... ." There is no question that "inconsistent or varying adjudications" (or settlements) concerning the rules establishing the relationships between players and the League over contract matters would be possible, perhaps even likely, if class members were entitled to opt out and litigate the claims for structural relief on an individual basis. Thus, there is no legitimate basis for challenging the non-opt out class certification on that aspect of the case.

But petitioners also objected to the denial of an opt out for their individual claims for money damages. The district court recognized that the class could also have been certified under Rule 23(b)(3), which contains an absolute right to opt out for each class member, but ruled that, where both (b)(1) and (b)(3) certifications are available, the proper course to follow is to certify the class under (b)(1). Pet. App. 216-17. *Amicus* agrees that claims for injunctive relief, particularly such as those seeking the kind of structural relief accorded here, which essentially rewrote the basic contractual relationship between the players and the League, are not required either by Rule 23 or Due Process to allow class members to opt out.

Although we agree that the district court properly certified the injunctive aspects of this case under Rule 23(b)(1), and could also have relied on Rule 23(b)(2), neither provision has anything to do with substantial damages claims, such as those alleged by petitioners here. Damages claims plainly do not meet the requirements of subsection (b)(1)(A) since, even if they yielded "inconsistent or varying adjudications," they do not create "incompatible standards of conduct" for the defendant, except that some claimants receive compensation and others do not. Nonetheless, as a result of the district court's decision to certify both injunctive claims and damages claims under Rule 23(b)(1), petitioners

were denied their right to opt out and instead were forced to accept the formula for damages provided in the settlement agreement, even though they believed that could obtain more money, either in settlement or after trial, in their own antitrust cases which were already pending in other courts for all but two of the petitioners.

One other aspect of the settlement bears noting in connection with the claim by the settling parties that opt outs could not be permitted for damages claims. The agreement itself contained a formula for the payment of damages to class members based on the effects of Plan B on them, and a pool of money to be divided among those who claimed injuries based on price fixing for pre-season pay. However, the agreement also creates a series of exceptions, both for the named plaintiffs in this litigation and the named parties in some other cases against the NFL—those supported by the Players Association—but not those which these petitioners had filed. Pet. App. 231-34. Those exceptions created entirely separate payment plans for their beneficiaries that were far more generous than the basic settlement. While that does not prove that they are improper, it does make clear that any claimed need for an all-inclusive settlement, with a single payment plan, is insupportable.

Even more damning is the exclusion, from any agreement on damages, of the entire case of *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), which had been tried and was then on appeal to the District of Columbia Circuit and was just recently reversed. 1995 WL 115729 (D.C. Cir.). If that case could be excluded from a global settlement, there was no reason in principle why those cases in which petitioners were involved, or other cases that might be filed by others who would have liked to have opted out, could not have been allowed to go forward on their own,

either to judgment or settlement, instead of being bound by the formula in the settlement agreement.[2]

Despite all of these differences among class members, the district court certified a single class and then precluded any class member from opting out. Petitioners' appeal to the Eighth Circuit focussed on the lack of an opt out, but also argued that the settlement was not fair, especially with respect to the disparities between damages for class members under the formula and damages awarded the named plaintiffs in this and other specially-favored cases. Although we agree with petitioners that neither court below gave sufficient consideration to the issue of unfairness, allowing an opt out would provide an essential safety valve to help assure that named plaintiffs do not receive amounts greatly in excess of those accorded the rest of the class, since if they do, others will opt out and try for the same bargain.

The Eight Circuit affirmed, in a brief opinion which never addressed the opt out issue. The court of appeals took the position that an opt out was necessary solely to deal with the problem of personal jurisdiction over out-of-state class

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[2]In addition to the disparity in damages awarded by the jury in *McNeil*, *supra*, note 1, the settlement agreement recognized that all players are not in equal bargaining positions and do not command equal wages. Thus, the agreement establishes categories of franchise and transition players who may be specially protected in the future, but only if they are paid, respectively, within the top 5 and top 10 players at their positions, which themselves are divided into eleven categories, with distinctions made between cornerbacks and safeties, and between defensive ends and defensive interior linemen, not to mention broader differences between offense and defense and linemen and backs. Settlement Agt. § VIII 7. Unlike those categories governing future situations, the payment formula for past damages treated all players, except those expressly excluded because they were parties to certain prior lawsuits, on the same basis, regardless of the position they played or their skill, based on prior salary or other measurement.

members. Since it found that petitioners either were subject to personal jurisdiction or had voluntarily entered the action, and hence waived any jurisdictional objection which might trigger an opt out, it believed that it did not need to reach the question of the effect of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in a case involving claims for both damages and injunctive relief.[3]

REASONS FOR GRANTING THE WRIT

1. As both petitions make clear, the decision of the district court refusing to allow class members with individual claims for money damages to opt out those claims is directly contrary to the ruling of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (1992). Since this Court granted review in *Ticor* to resolve the very issue presented here, but ultimately dismissed the petition as improvidently granted, over the dissents of three justices, 114 S. Ct 1359, 1362 (1994), and since the Court has not yet resolved that issue, review is plainly warranted.

If there were any question that the issues presented in both cases are the same, the brief *amicus curiae* filed by the NFL in *Ticor* contained a short summary of argument on page 3 removing any such doubt:

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[3]Because both petitions demonstrate the error in this approach by the court of appeals, we address it only briefly. *Shutts* was not simply a case about the limits of the reach of state courts, but dealt more generally with the issue of when persons who were not named parties could be bound, as part of a class, in an action seeking money damages. Thus, we read *Shutts* as requiring the same notice and opt out rights for all non-parties, even those who reside in the forum state, in order to satisfy Due Process. For that reason, as well as those stated in the petitions, the attempt by the Eighth Circuit to avoid confronting the impact of *Shutts* in this case was unavailing.

> The history of the NFL's labor dispute with its players that culminated in the class action settlement in *White*, together with the procedural safeguards employed therein to protect the interests of absent class members, demonstrates that the Ninth Circuit's decision is overbroad and incorrect. The decision below: (i) adopts unwarranted and unprecedented new standards of due process where claims for injunctive relief predominate over claims for monetary relief; (ii) if affirmed, would render unconstitutional all mandatory federal class actions involving damage claims, thereby invalidating Federal Rules 23(b)(1) and (b)(2) in a large number of cases; and (iii) severely undermines the practical utility and policy goals of the Rule 23 mechanism. Accordingly, the Ninth Circuit's decision should be reversed.[4]

In addition to the cases cited by petitioners, the conflict among the circuits is deepened by the Fourth Circuit's decision in *In re A.H. Robins Co., Inc.*, 880 F.2d 709, in which this Court denied certiorari, with Justice White dissenting, 493 U.S. 959 (1989). Like this case, the claims

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[4]We recognize that the NFL's *amicus* brief in *Ticor* (p. 11 n.7) argued that the two cases were distinguishable because no money was paid to class members in *Ticor*, whereas class members in this case received substantial payments, although less than petitioners believe they are entitled to receive. We admit the factual distinction, but fail to understand its relevance on the issue of whether members of either class had a right to opt out under Rule 23 or the Due Process Clause. Indeed, if anything, the lack of any payment in *Ticor* suggests that the case was only about injunctive relief, whereas there is no question here that the claims for money damages are substantial, measured both by the dollars at stake and the reasonable likelihood of success.

for money damages at issue in *Robins* had been certified as a class action under Rule 23(b)(1), with no right of opt out. While there are a number of factual and perhaps legal differences between that case and this, the opinion in *Robins* further evidences the confusion among the lower courts about the circumstances, if any, under which there may be a non-opt out class action involving claims for substantial money damages.

Finally, we note that other courts, particularly the Eleventh Circuit and the Ninth Circuit (consistent with its later expressed view in *Ticor*), have held, in direct contrast to the district court's reasoning here, that an expansive view of Rule 23(b)(1) in damage cases is an impermissible encroachment on the rights provided by Rules 23(b)(3) and (c)(2). *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (citing other cases, and noting "that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under that section, thereby making the other subsections of the Rule meaningless, particularly Rule 23(b)(3)"); *McDonnell Douglas Corp. v. United States District Court for the Central District of Calif.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

2. Beyond the conflict in the circuits, review should be granted because the question presented is of special importance and the decision to deny petitioners the right to opt out violated Rule 23 and the Due Process Clause. Moreover, the decision to deny any opt outs was unnecessary to achieve the legitimate goal of assuring that the newly negotiated NFL rules governing terms and conditions applicable to player contracts would apply to everyone.[5]

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[5]To the extent that petitioners argue that Due Process requires that they be entitled to opt out of the claims for injunctive relief, (continued...)

There are several means by which the district court and the parties here could have protected the rights of petitioners, consistent with Rule 23 and Due Process. First, two classes could have been certified: one for damages and the other for injunctive relief, with only the latter being mandatory. Second, one class could have been certified, but class members allowed to opt out solely with respect to their damages claims. Third, there could have been a class only for injunctive relief, and the damages claims could have proceeded in independent lawsuits, as apparently was intended when the case was filed, since, as noted above, the original complaint did not include a claim for money damages. What could not take place was what happened here: class members with damages claims were forced to

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[5](...continued)
we disagree. However, we do agree that, especially because of the absence of an opt out, district courts must follow the mandate of Rule 23(c)(2)(C) and the Advisory Committee Notes to the 1966 Amendments to Rule 24, and allow class members to intervene and to take reasonable discovery to enable them to make their objections meaningful. Moreover, where there is no opt out, the courts must review proposed settlements with great care precisely because they bind all members of the class, in this case, all past, present, and future NFL players. Contrary to the suggestion made by the NFL in its *amicus* brief in *Ticor* (at 24 n. 20), extensive findings by the district court, adequate representation by class counsel, notice, an opportunity to be heard, and a fairness hearing are not "the functional equivalent of those [safeguards] provided by the opt-out provisions of Rule 23(b)(3)." *See Eisen v. Carlilse & Jacquelin*, 417 U.S. 156, 176-77 (1974) (finding of adequacy of representation not a surrogate for notice and opt-out rights under Rule 23); *cf. In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 1995 WL 223209 (3d Cir.) (fairness determination may not serve as surrogate for Rule 23 class certification findings). If they were equivalent, there would be no need for Rule 23(c)(2) to grant an express right to opt out, applicable only to classes certified under Rule 23(b)(3).

accept the terms negotiated by class counsel, with no right to negotiate or litigate on their own.

This result is first compelled by Rule 23. The drafters of the Rule made clear that, for individual claims for money damages, such as those at issue here, the right of opt out must be given. Surely, the mandatory notice and opt out rights in Rule 23(c)(2) cannot be avoided simply by relabelling a (b)(3) class as one under (b)(1) or (b)(2). Yet that is the impact of the ruling by the district court: the protections of Rule 23(c) can be overridden by use of Rule 23(b)(1). As noted above, we do not believe that claims for damages, as opposed to those seeking injunctive relief, can be brought under subdivision 1 since the problem to which that provision is addressed—situations where inconsistent verdicts leave the party opposing the class with conflicting primary obligations to class members—is simply not a problem when the relief sought is a judgment for money damages.

Nor do we agree with the district court that it is relevant whether the claims for injunctive relief "predominate" over those for damages for several reasons. Pet. App. 219-21. First, Rule 23(b)(3), not Rule 23(b)(1), uses the word predominate, and thus the concept of predominance has no place in the analysis of the scope of subsection (b)(1). Second, we doubt that predominance can be accurately measured, or that it is even a useful concept, in cases where there are substantial claims for both money damages and injunctive relief. The problem is greatly magnified in this case because, as noted above, there are class members, such as former players, who have no interest in injunctive relief and are seeking only money damages, and others, such as those who are still in college, who are not even eligible for monetary relief. Thus, even if the concept of "predominance" were a meaningful one in some situations, it seems clear that the predominance calculation here is not a unitary one for the class as a whole, but varies with each individual class member. Finally, to assume that

all claims could be properly certified under Rule 23(b)(1), would necessarily mean that the drafters of Rule 23 would have been willing to permit the denial of the right to opt out, after having insisted on it for all damages class actions brought under Rule 23(b)(3). That assumption is a very difficult one to accept, especially in light of the Due Process problems that such a construction of the Rules would raise, the issue to which we now turn.

The fundamental rule of law, embodied in the prohibition against deprivation of property without Due Process, is that no person may be deprived of a claim against another without a day in court. That is the message of the seminal case of *Hansberry v. Lee*, 311 U.S. 32 (1940), and that is the basis on which this Court had to examine the claims of the defendant in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), that Due Process prohibited a nationwide class from being maintained in state court.

There is, of course, an exception to the requirement that a person must be a party to a lawsuit before his or her rights can be affected where that person is part of a valid class. *Hansberry* teaches that adequate representation is a prerequisite, and *Shutts* teaches that at least adequate notice is also required. *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The question that remains is, when is the right to opt out an essential element of Due Process? While we believe that *Shutts* strongly suggests an opt out is required whenever a class member has substantial claims for money damages, we do not contend that *Shutts* absolutely decided that issue, at least as applied to the facts of this case.

In *Shutts*, the defendant argued that the Due Process rights of out-of-state class members were violated by a nationwide class, but this Court rejected that claim, as applied to that class, where notice had been given by first class mail to each class member, the certified class excluded those to whom the notice could not be delivered, and each

class member was given the right to opt out. 472 U.S. at 801. Although there is language in the opinion from which it can be argued that the Court decided that an opt-out right is always required where there are claims for money damages, *id.* at 812, that was not the holding of *Shutts* since there a right to opt out had been granted.

In our view, the answer to the Due Process question presented here must be derived by looking to the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due. As we spelled out in our *amicus* briefs in *Shutts* and *Ticor*, applying that test leaves no doubt that Due Process requires that individual claims for money damages of the kind possessed by petitioners here cannot be resolved by settlement of a class action or otherwise, unless the claimants are given the opportunity to litigate those claims with attorneys of their choosing, in a forum of their choosing.

The question of whether to apply the *Mathews* test, as both Public Citizen and the petitioners urged in *Ticor*, and how to apply that test in this context, are important questions which this Court should decide. Thus, in addition to the reasons offered in the petitions, the application of the *Mathews* test provides a further basis for granting review.

The question presented by the petitions, as restated in this brief, is by no means limited to the antitrust context. Indeed, the most likely area where the issue will be litigated is under Title VII of the Civil Rights Act of 1964, in particular the 1991 amendments to it. Prior to the amendments, only back pay was available for violations of Title VII, but now compensatory damages and a right to a jury trial have been added. Whereas formerly most employment discrimination cases were certified solely under Rule 23(b)(2), or perhaps under Rule 23(b)(1)(A), the availability of individual damages under Title VII now raises the issue of whether that past practice may continue, at least

without affording individual claimants a right to opt out on their damages claims.

Indeed, in *Ticor,* the Lawyers' Committee for Civil Rights under Law filed an *amicus* brief on this very question. It argued that Rule 23(b)(3) was not the only way to deal with cases in which there are claims for both injunctive and monetary relief, but conceded that cases that seek both injunctive relief and substantial damages under the civil rights laws would have to allow class members to opt out with respect to their damages claims. Brief at 19-20. Although cases of this kind under Title VII are just starting to move through the courts, a ruling in this case could provide much useful guidance, if not a definitive answer, to the question of how those cases should be handled.

Similar issues arise in the securities field, although perhaps with less frequency than in employment cases, since most securities claims seek money damages only, or at least primarily. Nonetheless, a ruling here would provide assistance to courts facing the problem in that context, and perhaps in others as well. Finally, as illustrated by *Shutts*, most states have provisions similar to Rule 23, and in any event are bound by the Due Process Clause. Therefore, a decision in this case would also be helpful to state courts in their handling of class actions.

CONCLUSION

For the foregoing reasons, and those set forth in the petitions, writs of certiorari should be granted in both cases, limited to the question as set forth in this brief.

Respectfully submitted,

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Nos. 94-1749, 94-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

MARK DUSBABEK, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review questions that the court below expressly declined to consider or decide.

2. Whether, in a class action properly certified under Federal Rule of Civil Procedure 23(b)(1) and involving claims predominantly for injunctive relief, class members who are subject to the class action court's personal jurisdiction have an absolute right to opt out of the class.

3. Whether, in a class action involving claims predominantly for injunctive relief, the presence of claims for monetary damages precludes class certification under Federal Rules of Civil Procedure 23(b)(1) and/or (b)(2).

PARTIES TO THE PROCEEDING

The National Football League (the "NFL" or the "League") and 28 of its member clubs are Respondents in this proceeding (the "NFL Respondents").* The NFL Respondents were the defendants in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson, on behalf of the *White* class, are Respondents in this proceeding (the "Player Respondents"). The Player Respondents were the plaintiffs and the class representatives in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Mathews, and Van Waiters are Petitioners in this proceeding (the "Jones Petitioners"). The Jones Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

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* The member clubs of the NFL who are Respondents in this proceeding are: The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; The Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.; The New Orleans Saints Limited Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B&B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; Chargers Football Co.; Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-Football, Inc.

NFL players Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Maurice Hurst, John Fourcade, and Byron Evans are Petitioners in this proceeding (the "Dusbabek Petitioners"). The Dusbabek Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

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IN THE
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SEAN JONES, et al.,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 41 F.3d 402 (8th Cir. 1994) ("*White III*") and is reprinted in Petitioners' Appendix at 2-17. The decision of the District Court granting final approval to the settlement agreement, as amended, and the Final Consent Judgment entered in accordance therewith are reported at 836 F. Supp. 1458 (D. Minn. 1993) ("*White II*") and at 836 F. Supp. 1508 (D. Minn. 1993), respectively, and are reprinted in Petitioners' Appendix at 34-169 and 26-33, respectively. The decision of the District Court granting final approval to the original settlement agreement and enjoining the lawsuits of individual class

members is reported at 822 F. Supp. 1389 (D. Minn. 1993) ("*White I*") and is reprinted in Petitioners' Appendix at 170-300.

COUNTERSTATEMENT OF THE CASE

This labor dispute between NFL clubs and NFL players involved a broad challenge to the nature and structure of various player employment practices in the NFL, including the League's Plan B veteran player employment rules, the College Draft, the NFL Player Contract, and the League's preseason pay rules. At the heart of the dispute were the parties' conflicting views with regard to free agency. The players contended that they were entitled to complete free agency, under which each NFL player would be free, without restriction, to offer his services to every NFL team upon expiration of his contract. The League, on the other hand, maintained that there must be some restrictions on a veteran player's mobility so that the best NFL players would not flock to the more attractive markets or to the better quality teams, thereby disrupting competitive balance in the League and making the NFL's entertainment product less attractive to consumers.

In October 1987, several NFL players filed *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), a mandatory class action alleging that the League's collectively bargained free agency system and various other employment practices violated the antitrust laws. The District Court in *Powell* certified a mandatory non-opt-out class action for injunctive relief and damages. *See Powell v. NFL*, 711 F. Supp. 959, 966-69 (D. Minn. 1989). In November 1989, the Eighth Circuit Court of Appeals held that the players' claim was barred by the nonstatutory labor exemption to the antitrust laws. *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Immediately following the Eighth Circuit's decision in *Powell*, the National Football League Players Association (the "NFLPA") purported to disclaim its status as the exclusive collective bargaining representative of NFL players. This step was intended to terminate the labor exemption, to put an end to collective bargaining, and to shift the labor dispute to the antitrust courts. Specifically, the NFLPA began funding and otherwise directing the filing of multiple antitrust actions against the NFL and its member clubs. Over the next three years, that campaign resulted in the filing of approxi-

mately 24 separate lawsuits, many of which were funded by the NFLPA, in fifteen federal and state courts across the country.

Among these cases was *McNeil v. NFL*, Civ. No. 4-90-476 (D. Minn.). *McNeil*, ostensibly brought by eight individual plaintiffs, challenged the legality of the League's Plan B free agency system. *McNeil* was tried to verdict in a ten-week trial. The jury found that Plan B: (1) "[had] a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) was "more restrictive than reasonably necessary to achieve . . . competitive balance." *See McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,769 (D. Minn. 1992) (Special Verdict Form). The jury awarded damages only to four of the eight plaintiffs in amounts significantly less than those four players had sought. *See id.*

Less than two weeks after the *McNeil* verdict, the Player Respondents filed this class action. The complaint originally sought only injunctive relief but was later amended to include a claim for antitrust damages. In October 1992, plaintiffs in *White*, as well as the plaintiffs in *McNeil*, moved for an injunction seeking to bar defendants from enforcing Plan B or imposing any other system limiting the market opportunities available to veteran NFL players whose contracts were to expire on February 1, 1993.

Against this backdrop of numerous and varied litigations, pending post-trial motions in *McNeil*, injunction motions in *McNeil* and in *White*, and the certainty of an appeal involving "complex and difficult" and "significant issues for appellate review,"[1] on January

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[1] In later approving the terms of the *White* class settlement, the District Court specifically identified several "significant issues for appellate review" that would have been raised in any appeal of the *McNeil* verdict, including: (1) the scope of the nonstatutory labor exemption; (2) the application of the rule of reason under Section 1 of the Sherman Act and, specifically, burden of proof issues related thereto; (3) the court's jury instructions regarding antitrust injury; and (4) its determination with regard to the League's "single enterprise" defense. *See White II*, 836 F. Supp. at 1467 n.25 (Pet. (continued...)

6, 1993, the parties reached an agreement in principle to settle the *White* case and a wide range of related litigation. The settlement was the result of extensive arm's-length negotiations between class counsel and the League. Pursuant to Rule 23(b)(1), the District Court conditionally certified a mandatory settlement class consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

See Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Jan. 6, 1993); Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Feb. 17, 1993). In the words of the District Court:

> Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

822 F. Supp. at 1395 (Pet. App. at 175).

In February 1993, the parties in *White* executed a formal Stipulation and Settlement Agreement that was designed to bring an

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[1](...continued)
App. at 56-58 n.25); *see also White I*, 822 F. Supp. at 1418 (Pet. App. at 184-85).

end to this litigation and to a wide range of related cases.[2] The settlement represented a compromise on a wide array of structural issues. For the players, the settlement provided, among other things, a system of unrestricted free agency for those with at least four years of accrued service in the League. Thus, the players were able to achieve their principal and overriding objective in bringing this litigation.

At the same time, the League was able to protect to some extent its interest in competitive balance by preserving the College Draft, limiting the number of players that could become free agents in any one year, providing a League-wide cap on salaries and the amount of money to be paid to untested rookies, and limiting the number of veteran free agents that the League's "better" teams could sign.

In addition to providing prospectively for a guaranteed share of League-wide revenues to be paid to all players (which will provide players with billions of dollars), the settlement called for a $115 million payment to be distributed to class members through a settlement distribution formula approved by the District Court. 822 F. Supp. at 1421-24 (Pet. App. at 253-62).

After notice was provided to class members, 73 NFL players (out of an identifiable class of approximately 5,000) filed objections to the proposed settlement. All objectors were given a full and fair opportunity to voice their objections, including the opportunity to produce witnesses, to cross-examine witnesses offered by others, and to offer exhibits, at a formal court hearing on the fairness, reasonableness, and adequacy of the proposed settlement. Many did so. That hearing also addressed defendants' request for an

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[2] *See* Stipulation and Settlement Agreement, *White v. NFL*, No. 4-92-906 (D. Minn. Feb. 26, 1993). As part of the global settlement, the parties also settled eleven other pending federal and state court player lawsuits, all funded by the NFLPA, challenging the League's player employment rules. *See White I*, 822 F. Supp. at 1416 n.36 (Pet. App. at 237 n.36).

order enjoining all pending and future cases brought by individual class members involving the employment practices at issue in *White*.

Several weeks after the fairness hearing, the District Court issued a 115-page order overruling all objections to the proposed settlement and enjoining individual lawsuits involving similar claims by class members. *See* 822 F. Supp. at 1426, 1433-35 (Pet. App. at 260, 288-94).

In May 1993, one week after the District Court's approval of the original Stipulation and Settlement Agreement but before the court had entered a final judgment, the NFL clubs and the NFLPA entered into a new Collective Bargaining Agreement that incorporated the material terms of the settlement agreement as well as other terms and conditions of player employment. *See* 822 F. Supp. at 1435-36 (Pet. App. at 295-397). The new Collective Bargaining Agreement was ratified by approximately 96 percent of all NFL players voting. *See* 836 F. Supp. at 1467, 1483 (Pet. App. at 54, 102-03). The parties then moved to amend the Stipulation and Settlement Agreement to conform its terms to those of the Collective Bargaining Agreement.[3]

The District Court proceeded again with a formal settlement approval process. After preliminary approval and notice to all affected class members (*see* Order, *White v. NFL*, No. 4-92-906 (D. Minn. June 2. 1993)), formal objections to the amended settlement agreement were filed on behalf of 28 NFL players. This group of player-objectors was a subset of the group that had objected to the original Stipulation and Settlement Agreement.

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[3] The viability of the Collective Bargaining Agreement between the NFL clubs and players may depend on the continuing existence of the *White* settlement. If the mandatory class in *White* is not upheld on appeal and the NFL exercises its option to terminate the settlement agreement, the viability of the Collective Bargaining Agreement will be in question.

In early July 1993, the District Court held a final approval hearing to consider the amended settlement agreement. All class members and other interested parties were again afforded the opportunity to object to or otherwise express their views on the fairness, reasonableness, and adequacy of the settlement agreement, as amended.

On August 20, 1993, the District Court entered an order incorporating all of the findings set forth in its earlier settlement approval order, making certain additional findings, overruling all of the objections to the amended Stipulation and Settlement Agreement, and granting final approval thereto. *See* 836 F. Supp. at 1468, 1504 (Pet. App. at 58-59, 168-69). The court also entered a Final Consent Judgment. *See* Final Consent Judgment, *White v. NFL*, 836 F. Supp. 1508 (D. Minn. 1993) (Pet. App. at 26-33).

In the following weeks, a total of seven appeals from the Final Consent Judgment were noticed, two of which were subsequently withdrawn. The Jones Petitioners and the Dusbabek Petitioners together comprise four of the five groups of appellants below. The appellants sought reversal of the District Court's judgment on essentially the same grounds upon which they seek this Court's grant of certiorari but, as further explained below, the Court of Appeals did not reach many of those grounds in resolving the appeals.

On December 6, 1994, the Eighth Circuit unanimously affirmed the District Court's judgment. Specifically, the Court of Appeals held that: (1) the District Court's class certification under Rule 23(b)(1) and its inclusion of *these* objectors in the mandatory class constituted a proper exercise of the District Court's discretion, 41 F.3d at 407-08 (Pet. App. at 12-14); (2) the interests of the plaintiff class were adequately represented by the named plaintiffs and their counsel and were adequately protected by the settlement agreement, 41 F.3d at 408 (Pet. App. at 14-15); (3) the class members were given adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class, 41 F.3d at 408-09 (Pet. App. at 15-16); and (4) the District Court's injunction of related actions by individual class

members was a proper exercise of its jurisdiction over the mandatory class action, 41 F.3d at 409 (Pet. App. at 16-17).

Because the only remaining objectors to the settlement were all properly subject to the District Court's personal jurisdiction, the Eighth Circuit specifically declined to reach the primary issue presented here by the objectors and left undecided by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) -- "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." 41 F.3d at 408 (Pet. App. at 14).

On January 20, 1995, the Eighth Circuit denied the objectors' petitions for rehearing and their suggestions for rehearing *en banc*. *See* Order, *Evans v. NFL*, Nos. 93-3375, et al. (8th Cir. Jan. 20, 1995) (Pet. App. at 1).

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT EXPRESSLY DECLINED TO REACH THE PRIMARY QUESTIONS RAISED BY PETITIONERS

> Because of our view of the jurisdictional issue, we do not reach the issue raised by the objectors and left undecided by *Shutts*, namely whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed.R.Civ.P. 23(b)(1).

White III, 41 F.3d at 408 (Pet. App. at 14).

The Petitioners raise as their primary questions presented in this Court whether, in light of the presence of claims for monetary damages, the District Court properly certified, and maintained over Petitioners' objection, a mandatory, non-opt-out class. Because neither of these issues was decided by the Eighth Circuit, however, this Court should adhere to its usual practice and decline to consider these questions.

The Eighth Circuit's decision in this case was extremely narrow. The court held only that, in *this* case, a class action that sought predominantly injunctive relief, the District Court's inclusion of the objectors and refusal to grant them opt-out rights was a proper exercise of the District Court's discretion because all of the objectors were subject to the District Court's personal jurisdiction. *White III*, 41 F.3d at 407-08 (Pet. App. at 12-14). The Court expressly declined to decide whether, in other circumstances, a trial court may certify a non-opt-out plaintiff class in an action involving claims for money damages but brought primarily for injunctive relief.

This Court has consistently refused to review questions not considered or decided by the lower court. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Patrick v. Burget*, 486 U.S. 92, 99 n.5 (1988); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957); *Duignan v. United States*, 274 U.S. 195, 200 (1927). There is no reason for the Court to depart from its usual practice here. For that reason alone, the petitions should be denied.

II. THE RESULT REACHED BY THE EIGHTH CIRCUIT IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENT AND WOULD NOT HAVE BEEN DIFFERENT IN OTHER CIRCUITS

Notwithstanding the Court of Appeals' jurisdictional finding and its express refusal to reach the primary issues presented in the instant petitions, Petitioners claim that the result below warrants review because it conflicts with this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S 797 (1985), and the Ninth Circuit's decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). Petitioners assert that these decisions stand for the proposition that, in a class action properly certified under Rule 23, all class members have an absolute right to opt out of all class actions involving claims for money damages.

Contrary to Petitioners' contentions, however, the result below is not in conflict with this Court's decision in *Shutts* or with the Ninth Circuit's decision in *Brown*. Accordingly, exercise of this Court's certiorari jurisdiction cannot be justified on that basis.

A. There Is No Conflict with this Court's Decision in *Phillips Petroleum Co. v. Shutts*

There is no conflict with this Court's decision in *Shutts* because: (1) all of the Petitioners herein were subject to the class action court's personal jurisdiction; and (2) the class' claims for injunctive relief in this case predominated over the class' claims for damages.

1. No *Shutts* Issue Is Presented Because the Objectors Were Subject to the District Court's Jurisdiction

Shutts simply did not consider whether due process requires that class members with monetary claims be given the right to opt out of a properly certified mandatory class. The issue in *Shutts* was one of personal jurisdiction -- whether a state court could acquire jurisdiction over, and therefore bind, out-of-state class plaintiffs who lacked "minimum contacts" with the forum. 472 U.S. at 806-15. The Court held that Kansas' class action rule, which afforded notice and an opt-out right to non-resident class members, provided a constitutionally sufficient basis upon which to adjudicate their claims because class members who chose not to opt out had impliedly consented to the state court's jurisdiction.[4]

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[4] *See Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction. The essential question then, is how stringent the requirement for a showing of consent will be. We think that . . . the right to 'opt out,' [along with adequate notice,] satisfies due process.") (citations omitted); *id.* at 814 ("We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against [the defendant].").

Shutts therefore stands for the proposition that in class actions involving claims wholly or predominantly for money damages, an opportunity to "opt out" is necessary to establish consent to jurisdiction by class members over whom the court would not otherwise have jurisdiction. The opt-out reference in *Shutts* has nothing to do with, and cannot support, any unqualified due process right of class members to opt out of a class.[5]

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[5] Petitioners' own interpretation of *Shutts* has shifted over time. Some Petitioners who reside out-of-state argued below that *Shutts* guaranteed them a right to opt out, not because they were "absent" in the sense of being non-named, but because the class action court lacked a sufficient basis to exercise personal jurisdiction over them. *See, e.g.*, Objector/Appellant Byron Evans' Reply Brief (8th Cir. filed July 14, 1994), at 7 ("Evans' position throughout this matter has been that the exercise of jurisdiction over him by the Minnesota Court is inappropriate . . . . The Court cannot bind him to a settlement without affording him adequate notice, the right to opt out, and [adequate] representation within the class, *unless he has sufficient minimum contacts with Minnesota or he has consented to jurisdiction*.") (emphasis added); Reply Brief of Appellants Sean Jones, et al. (8th Cir. filed July 14, 1994), at 1 ("under the due process clause as elucidated in [*Shutts*], class certification of an action brought to resolve substantial damage claims belonging to *class members who are absent from the court's jurisdiction* cannot be granted [unless an opt-out right is afforded]") (emphasis added); *id.* at 12 ("*Given their lack of direct contacts with the forum*, Appellants had a constitutional right to opt out . . . . ") (emphasis added). After the courts below determined that Petitioners had consented to the District Court's jurisdiction, these Petitioners reversed field, and now argue in this Court that what below had been a "jurisdictional due process right" is actually an "absolute due process right."

Several courts of appeals, including the court below, have recently confirmed that the due process protections discussed in *Shutts* are unnecessary where, as in this case, the objecting class members are subject to the class action court's personal jurisdiction. There is no conflict whatsoever among the circuits on this unremarkable principle. *See, e.g., Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 & n.8 (3d Cir.) (notice plus an opportunity to be heard and participate in the litigation "are sufficient to bind *absent class members who had sufficient minimum contacts with the forum*") (emphasis added), *cert. denied*, 115 S. Ct. 480 (1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("Because there is no question that the court has jurisdiction over appellants, *Shutts* is inapposite. Thus, the district court did not abuse its discretion in denying appellants the opportunity to opt out of the class.") (emphasis added) (citations omitted), *cert. dismissed*, 113 S. Ct. 1070 (1993).

Even the Ninth Circuit -- the only circuit court as to which Petitioners claim a conflict -- has consistently interpreted *Shutts* as a case that defines the process necessary to bind class members who are not otherwise subject to the class action court's personal jurisdiction. Most recently, in *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Ninth Circuit stated:

> *Shutts* involved a multi-state class action brought in state court. . . . The issue before the court was whether a state could exercise jurisdiction over the claim of *an absent, non-resident class action plaintiff who lacked sufficient minimum contacts with the forum to support personal jurisdiction* . . . .

Id. at 1453-54 (emphasis added); *see also Besinga v. United States*, 923 F.2d 133, 136 n.6 (9th Cir. 1991) (describing *Shutts* as a case which prescribes what process is due to bind "*absent class members who are citizens of other states*"; further suggesting that *Shutts* may be of limited application because "it involved a state class action rather than a class action in federal court pursuant to Rule 23") (emphasis added); *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258, 262 (9th Cir.) ("In its most recent discussion of class

action 'opt out' procedures, the Supreme Court considered whether protections beyond the opportunity to opt out were constitutionally required to safeguard the rights of *a class plaintiff who was out-of-state*") (emphasis added), *cert. denied*, 113 S. Ct. 375 (1992).[6]

In this case, each of the Petitioners was specifically found to be within the jurisdictional reach of the District Court by reason of his minimum contacts with the state of Minnesota and/or because he had consented to the District Court's jurisdiction by participating extensively in the class action settlement proceedings. The District Court, expressly affirmed by the Eighth Circuit, found that the out-of-state objectors had knowingly and voluntarily submitted to the District Court's jurisdiction by: (1) personally appearing at court hearings to argue in opposition to the District Court's approval of the settlement agreement; (2) offering live testimony and/or cross-examining witnesses concerning the merits of the proposed

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[6] *See also Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1517 n.51 (N.D. Ala. 1991) ("it is reasonable to view the particular due-process analysis in *Shutts* as limited to the situations of *the out-of-state class member*") (emphasis added), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993); *Whitson v. Heilig-Meyers Furniture, Inc.*, No. 94-PT-0309-E, 1995 U.S. Dist LEXIS 4312, *48-*49 (N.D. Ala. Feb. 9, 1995) (*Shutts* stands for the proposition that in class actions "where a plaintiff class seeks primarily monetary relief, and where a proposed settlement seeks to bind *plaintiffs who are not subject to the personal jurisdiction of the court*, due process requires that class members be given an opportunity to opt out") (emphasis added); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 238 (N.D. Ga. 1989) (under *Shutts*, court refused to certify mandatory class where class members had "insufficient contacts to allow the court to exercise personal jurisdiction over them"); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985) ("The recent Supreme Court ruling in [*Shutts*] bars a mandatory class action under state law for most claims that are wholly or predominately for monetary damages *where most members of the class reside out of state")* (emphasis added).

settlement; and (3) filing numerous papers addressing the merits of the proposed settlement, including motions to intervene, an expert affidavit setting forth the estimates of their own damages, proposed findings of fact and conclusions of law, and memoranda of law. *See White I*, 822 F. Supp. at 1432 (Pet. App. at 287-88); *White II*, 836 F. Supp. at 1501-04 (Pet. App. at 160-65); *see also White III*, 41 F.3d at 407-08 (Pet. App. at 14) ("In the present case, each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement."). That conclusion, which is factual in nature, should be accorded deference by this Court. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982).

There is no question the activities described above are legally sufficient to constitute consent to jurisdiction in any context, including in the context of a mandatory class action. As the Third Circuit recently observed in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) -- a case upon which Petitioners placed significant reliance below -- "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum." *Id.* at 771.

Because there is no question that the District Court had a proper basis upon which to exercise personal jurisdiction over Petitioners, they have no right to the procedural protections (including the opt-out right) prescribed in *Shutts*.[7]

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[7] The District Court also enjoined the objectors' individual actions concerning the same player practices at issue in *White*. In light of (continued...)

2. In Any Event, *Shutts* Would Not Require an Opt-Out Right in this Case Because it Involves Claims Predominantly for Injunctive Relief

Even if Petitioners had not been subject to the District Court's jurisdiction, there would still not be a conflict with this Court's decision in *Shutts* because this case, unlike *Shutts*, involved claims primarily for injunctive relief.

Shutts was a class action involving claims that were purely monetary in nature. *Shutts*, 472 U.S. at 799. In ruling that the Kansas state court had properly exercised jurisdiction over the *Shutts* class, the Court concluded that, in class actions seeking *predominantly money damages*, personal jurisdiction may be exercised over an absent nonresident class member only if he has been afforded individual notice and an opportunity to exclude himself from the class. *Id.* However, the Court specifically limited its holding to "those class actions which seek to bind known plaintiffs *concerning claims wholly or predominantly for money judgments.*" *Id.* at 811 n.3 (emphasis added). The Court expressly cautioned that "[w]e intimate no view concerning other types of class actions. . . ." *Id.*[8]

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[7](...continued)
the express findings of both the District Court and the Eighth Circuit that the objectors had consented to the jurisdiction of the class action court, however, objectors' challenge to the District Court's injunction raises no issue worthy of this Court's review.

[8] In dissenting from the dismissal of certiorari in *Ticor Title Ins. Co. v. Brown* last term, three members of this Court expressly noted the Court's limitation on the scope of its holding in *Shutts*. 114 S. Ct. at 1363 ("although we held in *[Shutts]* that there is a constitutional right to opt out of class actions brought in state court, *that holding was expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments'")* (emphasis added) (O'Connor, J., joined by
(continued...)

But for the District Court's findings that each Petitioner's minimum contacts or litigation conduct had subjected him to the court's jurisdiction, the instant case would be precisely the "type of class action" about which the Court in *Shutts* intimated "no view." The District Court twice made express findings that the plaintiff class' claims for structural, injunctive relief in this case predominated over its claims for damages. *See White I*, 822 F. Supp. at 1410-11 (Pet. App. at 222-24); *White II*, 836 F. Supp. at 1471-72 (Pet. App. at 70-71). The Eighth Circuit expressly affirmed these findings, characterizing this class action as one "brought primarily for injunctive relief." *White* III, 41 F.3d at 408 (Pet. App. at 14).

Because neither petition seriously challenges the lower courts' "predominance" finding,[9] the issue decided by *Shutts* is simply not presented here. Moreover, because there is no basis for disturbing the lower courts' personal jurisdiction finding, the issue reserved by *Shutts* is not presented either.

B. For the Same Reasons that No *Shutts* Issue Is Presented, the Eighth Circuit's Decision Does Not Conflict with Ninth Circuit Authority

Petitioners claim that the decision below squarely conflicts with a single decision in the Ninth Circuit, *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). *Brown* in no way calls into question or otherwise conflicts with the extremely narrow holding of the Eighth Circuit in this case.

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[8](...continued)
Rehnquist C.J., and Kennedy, J., dissenting from dismissal of certiorari).

[9] The Petitioners merely reiterate their view that the class action involved claims for "substantial" damages (*see* Jones Pet. at 3-4; Dusbabek Pet. at 8-9). *Shutts*, however, does not speak to "substantiality"; it speaks to "predominance."

Brown involved a collateral attack by absent non-resident class members to a mandatory class action settlement in which claims for "substantial" money damages had been involved. The district court granted defendants' motion for summary judgment, holding that the claims were barred under the doctrine of *res judicata*. *Brown*, 982 F.2d at 390.

The Ninth Circuit reversed, holding that while the absent class members were bound by the injunctive relief provided by the settlement agreement, the class members' individual claims for treble damages should proceed. *Brown*, 982 F.2d at 392. Purporting to follow this Court's decision in *Shutts* -- which the court expressly recognized "was limited to claims 'wholly or predominantly for money judgments'" -- the Ninth Circuit held that the absent class members should have been provided an opportunity to opt out of the prior class action. *Id.*[10]

The Ninth Circuit in *Brown* and the Eighth Circuit in *White* were deciding two very different issues. The Ninth Circuit was charged specifically with determining what process was due to bind absent non-resident class members who had not submitted to the jurisdiction of the class action court in a case wholly or predominantly for money damages. The Eighth Circuit, on the other hand, had the very different task of determining what process is due to bind absent class members who were subject to the class action court's jurisdiction in a case predominantly for injunctive relief.

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[10] This Court granted the *Brown* defendants' petition for certiorari on the single question of "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the ground that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 56 (1993). After oral argument, by which time "the parties had reached a settlement designed to moot the petition," the Court dismissed the writ as improvidently granted. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994).

There is no conflict between the Ninth Circuit's decision in *Brown* and the Eighth Circuit's decision in *White*.

Moreover, subsequent Ninth Circuit decisions undermine Petitioners' efforts to infer from *Brown* an absolute right to opt out of all class actions properly certified under Rule 23 in which claims for monetary relief are asserted. Less than seven months after the Ninth Circuit's decision in *Brown*, another panel of that court decided *Arata v. Nu Skin International, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993), in which the Ninth Circuit affirmed a district court's certification and approval of a Rule 23(b)(1) mandatory non-opt-out class settlement where plaintiffs' complaint had sought both injunctive relief and damages.[11] The Ninth Circuit there held:

> The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, *in addition to damages*, both equitable and injunctive relief. An opt-out provision might create the risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for the defendants. . . . Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1)(A) or (B).

Id. at *6-*7 (emphasis added); *accord Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 464 (N.D. Cal. 1994) ("Although some of the opinion's language is a little broad and imprecise, the opinion [in *Brown*] relies entirely on [*Shutts*]. . . . '*Shutts* is limited to claims wholly or predominantly, for money damages.' Thus, it seems clear that under *Ticor* and *Shutts*, the constitutional due process requirement of notice to absent class members applies *only* to cases where monetary damages 'predominate.'") (emphasis in original) (citations omitted).

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[11] Because *Arata* is an unpublished opinion, the decision has been reprinted and included in the Appendix hereto.

In sum, subsequent cases confirm that *Brown* was not intended to grant absent class members opt-out rights in all Rule 23 class actions involving claims for monetary damages. Indeed, in the nearly three years since it was decided, not one court, either inside or outside the Ninth Circuit, has relied on *Brown* for the proposition that opt-out rights are constitutionally required in *all* class actions seeking money damages.

III. RULES 23(b)(1) AND 23(b)(2) WERE NOT INTENDED, AND HAVE NEVER BEEN CONSTRUED, TO PRECLUDE CERTIFICATION OF MANDATORY CLASSES WHERE CLAIMS FOR MONETARY RELIEF ARE INVOLVED

Federal Rule of Civil Procedure 23 has governed class actions in the federal courts for nearly 30 years. During that period, the lower federal courts have fashioned a remarkably uniform and consistent view of the proper application of Rule 23.

One principle that has become well-settled, though nowhere specifically prescribed in the Rule itself, is that class actions seeking *solely* or *predominantly* money damages should not be certified under the mandatory class certification provisions of Rule 23(b)(1) or (b)(2) unless a limited fund is at issue. By the same token, however, the lower courts have consistently held that where a class seeks predominantly injunctive relief, even though monetary claims may also be asserted, mandatory class certification under Rules 23(b)(1) and/or (b)(2) is perfectly appropriate.[12] Indeed, *every* federal circuit court to have considered the issue has upheld the use of mandatory, non-opt-out class actions under Rules 23(b)(1) and/or

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[12] As three members of this Court recognized just last term, "[t]he lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting from dismissal of certiorari).

(b)(2) in cases that have involved claims for monetary relief, as long as injunctive claims predominated.[13]

Moreover, this Court has never questioned the propriety of mandatory class certification under Rules 23(b)(1) and/or (b)(2) in such cases and, in fact, expressly upheld the use of a mandatory class in a case involving monetary claims for government benefits. *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (vacating and remanding Rule 23(b)(2) mandatory class action for employment discrimination *because lower court had failed to award monetary backpay relief*) (emphasis added).[14]

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[13] *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31-33 (1st Cir. 1991); *Robertson v. NBA*, 556 F.2d 682, 685 (2d Cir. 1977); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962-66 (3d Cir. 1983); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528-31 (6th Cir. 1986); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Reynolds v. NFL*, 584 F.2d 280, 283-85 (8th Cir. 1978); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 339-42 (10th Cir. 1975); *Howard v. McLucas*, 782 F.2d 956, 961 (11th Cir. 1986); *Larionoff v. United States*, 533 F.2d 1167, 1181-82 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

[14] Petitioners' repeated intimations that the Ninth Circuit has demonstrated a divergent or more "enlightened" view regarding the proper utilization of mandatory class actions is wrong. The Ninth Circuit has routinely certified mandatory classes despite the existence of claims for monetary relief. *See, e.g., Arata v. Nu Skin Int'l, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993) (reprinted in Appendix hereto); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Saunders v. Naval Air*

(continued...)

There is nothing in the text of Rule 23, or in the Advisory Committee's Notes that accompanied its adoption, to suggest that any other interpretation of Rule 23 was intended or is even reasonable. To the contrary, the Advisory Committee's Notes confirm that mandatory class certification is appropriate in cases predominantly involving claims for injunctive relief but also having significant damage claims.

The Advisory Committee provides as examples of appropriate cases for treatment under Rule 23(b)(1) a number of causes of action that would typically include claims for monetary relief: actions for damages against a common or limited fund, actions by shareholders to compel the declaration of a dividend, and litigations instituted by security holders or other beneficiaries of a trust against the trustee for breaches of his fiduciary duties. *See Amendments to Rules of Civil Procedure, Advisory Committee's Notes to Rule 23*, 39 F.R.D. 69, 100-01 (1966) (hereinafter "*Advisory Notes*").[15] Similarly, the fact that the Advisory Committee excludes from certification under (b)(2) claims "exclusively or predominantly [for] money damages" necessarily implies that claims for money damages

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[14](...continued)
Rework Facility, 608 F.2d 1308, 1312 (9th Cir. 1979); *EEOC v. General Tel. Co.* , 599 F.2d 322, 334 (9th Cir. 1979), *aff'd on other grounds*, 446 U.S. 318 (1980); *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *aff'd in relevant part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979).

[15] Among the cases cited by the Advisory Committee as examples of cases that typically would be eligible for mandatory (b)(1) certification were: *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947) (securities class action brought by former minority stockholder against Delaware parent corporation to recover class damages for fraud); *Edgerton v. Armour & Co.*, 94 F. Supp. 549 (S.D. Cal. 1950) (class action brought by former stockholders of dissolved corporation for sums due on contract); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944) (class action brought by beneficiary of trust against trustee to recover damages for breach of fiduciary duties), *rev'd on other grounds*, 326 U.S. 99 (1945).

that do not predominate may be certified. *Advisory Notes*, 39 F.R.D. at 102. Such interpretation is confirmed by the types of actions the Advisory Committee lists as illustrative cases for mandatory class certification under Rule 23 (b)(2): civil rights cases, antitrust cases for illegal price discrimination, and actions alleging patent infringement -- all of which could, and usually do, include claims for money damages. *See id.*

In sum, the consistent treatment of mandatory class actions brought primarily for injunctive relief, but also involving damage claims, has established a sound rule of law that need not be reviewed by this Court. It can fairly be said that "[Rule 23(b)(1)'s] validation is its pedigree." *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

CONCLUSION

For all of the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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May 1995

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APPENDIX

PATRICIA ARATA, on behalf of herself and all others similarly situated, Plaintiff-Appellee, CHARLES C. BROWN, Plaintiff-Appellant, v. NU SKIN INTERNATIONAL, INC., a Utah corporation; CLARA McDERMOTT, Defendants-Appellees.

ARATA v. NU SKIN INTL., INC.

No. 92-15380

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1993 U.S. App. LEXIS 21747

July 14, 1993 **, Submitted, San Francisco, California

**The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

August 24, 1993, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *5 F.3d 534, 1993 U.S. App. LEXIS 30282.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. CV-91-02811-FMS. Fern M. Smith, District Judge, Presiding.

DISPOSITION: Affirmed

JUDGES: Before: WALLACE, Chief Judge; D.W. NELSON and O'SCANNLAIN, Circuit Judges.

OPINION: MEMORANDUM

Nu Skin is a self-styled "multi-level marketing program," in which distributors, lured by the promise of big money earned through little effort, purchase cosmetic and hygiene products in an effort to ascend a ladder of marketing positions. It is, in other words, a pyramid scheme. Distributors' earnings depend on product sales and commissions for recruiting new participants. To remain in the distribution ladder, and thus earn commissions from "downline" distributors, distributors must maintain a volume of wholesale purchases of Nu Skin products. Patricia Arata, a Nu Skin distributor, filed a class action against Nu Skin International, Inc., Blake M. Roney, Keith Halls, Clara McDermott, and Steven J. Lund (collectively, "defendants"), alleging that the defendants, in promoting and selling Nu Skin [*2] distributorships, violated federal securities laws and the Racketeer Influenced and Corrupt Organizations Act. She also asserts a number of state law claims.

On November 26, 1991, the district court certified a settlement class and granted preliminary approval of a proposed settlement agreement. The settlement class includes more than 835,000 current and former Nu Skin distributors. On January 20, 1992, the appellant, Charles Brown, submitted his objections to the proposed settlement agreement. On January 31, 1992, after a hearing to consider objections, the district court granted final approval to the settlement and awarded fees and costs to plaintiff's counsel.

Brown timely filed a notice of appeal on February 28, 1992. He contends that the district court erred in certifying a mandatory settlement class and, in approving the settlement and the award of attorneys fees, failed to protect the interests of absent

class members. We have jurisdiction pursuant to *28 U.S.C. § 1291*. We affirm.

I

The defendants have moved to dismiss Brown's appeal, contending that he lacks standing. The plaintiffs-appellees join the defendants' motion.

The settlement class [*3] certified by the district court is defined as "all persons who are or were Independent Distributors in the Nu Skin International, Inc., network marketing program within the past three years and who incurred a net economic loss." The defendants concede that Brown signed a distributorship agreement and charged $ 285.99 worth of Nu Skin products. The defendants allege, however, that Brown never picked up the products he charged. He claims that he did. The facts alleged by Brown put him within the definition of a class member. He received notice and filed an objection. As a member of the class, his legal rights are affected by the settlement. He therefore has standing to appeal. *Marshal v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977)*; see also Newburg on Class Actions, § 16.01, at 16-6 (3d ed. 1992).

II

Brown contends that the district court abused its discretion in certifying the class because all the requirements of Rule 23(a) have not been met. In particular, he contends that there are not questions common to the class and that the claims of the representative plaintiff are not typical of the claims of the class. See Fed. R. Civ. [*4] P. 23(a)(2) & (3). We review the district court's certification of a class for an abuse of discretion. *Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990)*.

A

It appears both from the complaint and from the record that there are common questions of law and fact. The complaint alleges that, to entice investors, the defendants created standardized, scripted telephone solicitations, promotional seminars, inspirational audio and video tapes, and written materials, all containing material misrepresentations and omissions. Declarations and exhibits in the record support the allegation that the defendants intended these uniform presentations to be used by others to recruit new distributors. Thus, the issue of the defendants' conduct in making misrepresentations and withholding information is common to all members of the class. The district court therefore did not abuse its discretion in finding the requisite commonality. See *Cameron v. E.M. Adams & Co., 547 F.2d 473, 477 (9th Cir. 1976); Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975)* (class of purchasers allegedly [*5] defrauded over a period of time by similar misrepresentations is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable), cert. denied, *429 U.S. 816 (1976); In re Activision Securities Litigation, 621 F. Supp. 415, 428 (N.D. Cal. 1985); Bresson v. Thomson McKinnon Securities, Inc., 118 F.R.D. 339, 342 (S.D.N.Y. 1988)*; cf. *Soper v. Valone, 110 F.R.D. 8, 9 (W.D.N.Y. 1985)* (common factual and legal issues did not predominate where similar oral presentations were utilized to garner investments in different entities).

B

Brown next contends that the representative plaintiff's claims are not typical of those of the class "for the nple reason that there was only one named plaintiff in the case and yet there are at least two different types of claimants or recoveries spelled out in the Refund Program of the Settlement Agreement." He argues that any distinction between types of recoveries provided for in the settlement agreement creates a conflict of interest such

that the district court abused its discretion [*6] in finding sufficient typicality. Brown's contention is without merit.

The class is defined as Nu Skin distributors who incurred net economic loss. From allegations in the complaint as well as in her declaration, Arata's claims appear to be typical of the claims of the class. Thus, the explicit requirement of Rule 23(a)(3) has been met. Brown has failed to persuade us that any distinctions drawn in the structure of the refund program are significant. See *Blackie, 524 F.2d at 909-10*; see also *Gates v. Dalton, 67 F.R.D. 621, 630 (E.D.N.Y. 1975)*. Indeed, Brown's arguments in this regard go more to the reasonableness of the settlement than to the typicality of the class representative.

III

Brown contends that district court abused its discretion by certifying a mandatory class under Rule 23(b). This contention is also without merit.

The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, in addition to damages, both equitable and injunctive relief. An opt-out provision might create a risk of inconsistent or varying adjudications which could establish [*7] incompatible standards of conduct for the defendants. Moreover, the settlement agreement establishes a comprehensive equitable remedy -- an ongoing refund program with no limit as to the amount to be refunded. Class members have a common interest in the preservation and equitable distribution of the refund program. Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1) (A) or (B). Cf. *McDonnell Douglas v. United States District Court, 523 F.2d 1083, 1086 (9th Cir. 1975)*, cert. denied, *425 U.S. 911 (1976)*.

IV

Brown makes a number of arguments challenging the certification of a defendant class. There is, however, no indication in the record that the district court certified a defendant class.

V

Finally, Brown challenges the fairness of the settlement agreement.

In this case, in accordance with the procedures outlined in the Manual for Complex Litigation 2d, the district court evaluated the proposed settlement and granted preliminary approval. See MCL 2d, § 30.44, at 241. Then, before granting final approval to the settlement agreement, the court solicited comments [*8] and held a hearing. See id. In its final order, the court indicated that it had considered the presentations of counsel and the relative merits of the claims and the defenses, the complexity of the case, the likely duration and expense of the trial, and the risks attendant to both trial and appeal and had concluded that the proposed settlement was fair, reasonable, and adequate under the circumstances. Our review of that conclusion is a limited one. *Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (1992)*, cert. denied, *113 S. Ct. 408 (1992)*. "We are not permitted to substitute our notions of fairness for those of the district judge and the parties to the agreement." Id. (quotations omitted). Rather, we ask only whether the settlement is "fundamentally fair, adequate, and reasonable." Id. (quotations omitted).

We will not dwell long on the majority of Brown's arguments. Most rest almost entirely on supposition. For example, he speculates that the short time frame between the filing of the suit and proposal of settlement precluded any serious negotiation and suggests collusion. He also speculates that counsel [*9] failed to undertake discovery and he complains that the

settlement is preferential to the defendants because it allows them to avoid defending multiple suits. Simply put, he has not made "a strong showing that the district court's decision was a clear abuse of discretion." *Id.* (quotations omitted). Brown's two strongest challenges are to the structure of the refund program and to the attorneys' fees provision. We briefly consider those two claims.

A

The settlement agreement is weighted in favor of those who return products, providing them with a ninety percent refund, while those who can prove only economic loss receive a ten percent refund. Moreover, the total amount of refunds paid to those without products to return cannot exceed more than thirty percent of the entire amount refunded. Brown contends this distinction is arbitrary and capricious. However, the refund program appears to be responsive to the gravamen of the complaint. As Brown recognizes, the defendants' scheme required distributors to "inventory load." He does not explain why it was arbitrary for the settlement program to focus on remedying that concrete injury. Nor does he explain in what way the refund program [*10] falls outside of the range of reasonableness.

B

The settlement provides for an award of attorneys' fees equal to ten percent of the amount refunded, with $ 800,000 of those fees to be paid on a non-refundable basis from a reserve account established by the defendants. Relying upon *Jamison v. Butcher & Sherrard, 68 F.R.D. 479, 484 (E.D. Pa. 1975)*, Brown complains that the $ 800,000 payment creates the impression that the defendants have bought themselves out of the lawsuit. Jamison, however, is clearly distinguishable. In that case, the district court did not approve the settlement because the class received nothing beyond that to which it was already entitled under a previous settlement with SEC. *Id. at 483*. Under the circumstances, the court noted that a direct payment of attorneys' fees left the impression that the defendants were buying themselves

out of the lawsuit. *Id. at 483-84.* Here, in contrast, the settlement provides a substantial remedy for the class. Brown also suggests that detailed time records should have been submitted in support of the fee award. However, under [*11] the settlement agreement, attorneys' fees are to be calculated as a percentage of the total recovery. See *Six Mexican Workers, 904 F.2d at 1311*; see also *In re Activision Securities Litigation, 723 F. Supp. 1373, 1370-79 (N.D. Cal. 1989)* (in class action common fund or "equitable" cases the better practice is to set a percentage fee and, absent extraordinary circumstances, the rate should be set at thirty percent). Thus, it is not clear what purpose submission of time records would have served.

VI

In short, Brown has failed to show that the district court abused its discretion in certifying a mandatory settlement class or in approving the settlement agreement.

AFFIRMED